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A Guide to Mortgage Drafting in NSW

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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*
6. The Rights of Mortgagees *10 Nov 2005*
7. Mortgagees Power of Sale *23 May 2006*
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14. Licensing a Responsible Entity *20 March 2008**
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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1. Registrable form

An equitable mortgage of Real Property Act land can be created in many ways. The most common is when a mortgage document in registrable form is executed, but is not registered. An agreement to grant a registered mortgage in itself constitutes an equitable mortgage.

2. Verbal mortgages

Notwithstanding the *Statute of Frauds* provisions of s 23C of the Conveyancing Act, which provide that "no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same", it is possible in some circumstances to create an equitable mortgage other than by a signed document. In common with old system land, an equitable mortgage over Real Property Act land may be created by the deposit of title deeds as security (see *Re Nairn's Application* [1961] VR 26). Also, a defence by a mortgagor under s 23C of the Conveyancing Act cannot succeed if the mortgagee is entitled to rely on the doctrine of part performance, or has an estoppel against the mortgagor preventing that defence from being raised.

3. Registering an equitable mortgage

The Real Property Act only permits the registration of dealings in registrable form. If such dealings are registered, by virtue of that registration they constitute legal interests in land (having complied with all legal requirements of the Act). A registered equitable interest in Real Property Act land is thus a contradiction in terms, as registration transforms it into a legal interest.

4. Caveats

Lodging a caveat to protect an equitable interest does not constitute registration of the interest. A caveat simply warns other parties of the existence of the unregistered interest.

5. Registered memorandums used in unregistered mortgages

An equitable mortgage may incorporate by reference a memorandum that has been filed by the Registrar-General, but that does not affect the mortgage's status as an unregistered dealing.

B. Registered (Legal) mortgages

1. Proper Form

Only mortgages in proper form will be registered. The current form is a Form 05M and can be downloaded in PDF format from http://lpi-online.lpi.nsw.gov.au/e-rpforms/download.html. The form is usually referred to as the "Front Page". It identifies the parties, the land and specifies what annexure or registered memorandums are incorporated into the mortgage as covenants. Schedule 1 to the Real Property Regulation describes the manner in which annexure and memorandums are to be laid out.

2. Parties cannot be described on the Front Page as trustees
The LPI will not register dealings which express a party as holding their interest on trust. Thus a mortgage describing a mortgagee as "Roger Smith as Trustee for the Smith Family Trust" would be rejected.

3. Registered mortgages are deeds
A covenant is a promise in a deed. By s 36(11) of the Real Property Act, upon registration, a dealing has the effect of a deed. The promises in a registered mortgage may thus be referred to as covenants.

C. Registered memorandums

1. Legal standing
S 80A of the Real Property Act enables a memorandum filed by the Registrar-General to be incorporated into a dealing (provided the dealing is of a type specified in the memorandum) by reference in the dealing. In such circumstances the memorandum is "deemed to be set out at length in the dealing".

2. Covenants unrelated to the mortgage contained in a registered memorandum
In *McIntosh v Goulburn City Council* (1985) 3 BPR 9367, the NSW Court of Appeal held that s 80A of the Real Property Act caused all parts of a memorandum, whether or not they might be considered "capable of being covenants" to be deemed to be set out at length in the dealing incorporating them by reference.

The court in *Re Westpac Banking Corporation* [1987] 1 QdR 300 came to a like conclusion. Provided the Registrar-General files the memorandum in question, its full contents will be incorporated into the mortgage referring to the memorandum, regardless of the nature of those contents.

3. Using another lender's memorandum
Provided the dealing is of a class specified in the filed memorandum, any dealing may incorporate the memorandum by reference whether or not the parties to the dealing have any connection with the author of the memorandum.

Copyright can be claimed in a memorandum in a similar manner as for any other written work. As a dealing referring to a memorandum is deemed by s 80A of the Real Property Act to set out the memorandum at length, arguably registering such a dealing involves deemed copying of the memorandum capable of being considered a breach of any copyright in that memorandum.

Whether or not a breach of copyright exists, however, is in no way relevant to the enforceability of the dealing in question. In the case of any breach of copyright, the damages incurred by a person utilising another's memorandum would probably be minimal, although an injunction might be issued to restrain a repeat offender.

D. Parties to a mortgage

1. A mortgage given by a single joint tenant

A joint tenant can mortgage the joint tenant's interest in land. Such a mortgage may be registered under the Real Property Act. Although the position is not completely clear, the grant of a mortgage over a joint share in land probably does not in itself sever the joint tenancy (see *Penny Nominees Pty Ltd v Fountain (No 3)* (1990) 5 BPR 11284).

If the mortgagor dies the mortgagee's interest will cease as the mortgagor's share has passed to the other joint/s tenant by right of survivorship. If the other joint tenant/s dies, however, the mortgagee's security will be enlarged.

As the uncertainty of the security is an unattractive position for a mortgagee it is best to ensure that the joint tenancy is severed prior to the grant of a mortgage over a part share in land.

2. A mortgage given by a tenant in common

A tenant in common can mortgage the tenant's interest in land. Such a mortgage may be registered under the Real Property Act. If the tenant in common dies, the mortgage remains over the tenant-in-common's aliquot share of the land, there being no right of survivorship as exists in the case of a joint tenancy.

3. Contributory mortgagees

S 99 of the Conveyancing Act provides that where the mortgage does not specify that the money was advanced by co-mortgagees in shares, the mortgagees are deemed as between the mortgagor and themselves to be joint tenants of the mortgage. Thus in order to create a tenancy in common, there is a necessity to indicate in the mortgage that the money was contributed in shares. Clause 6 of the Real Property Regulation 2003 goes further and requires a specification in a dealing as to whether persons take as joint tenants or tenants in common, and if as tenants in common the dealing must further specify each tenant's share.

E. Mortgages dependant on extraneous documents

1. Covenants referring to extraneous documents

A mortgage can refer to documents not annexed to or registered with that mortgage, and not part of a filed memorandum. The reference to such a document in a mortgage covenant does not make the covenant unenforceable. If the document referred to does not in fact exist, however, that fact may render the covenant void for uncertainty.

In relation to an "all monies" mortgage where the mortgage simply secures all monies owing without specifying the quantum of those monies, one needs to look outside the mortgage to establish the obligations of mortgagor to mortgagee. These are often set out in a separate Guarantee, Deed of Loan or executed letter of offer.

2. Guarantees

In the case of a separate Guarantee, the mortgage is no stronger than the Guarantee itself. In *PT Ltd v Maradona Pty Ltd* (1991) 25 NSWLR 643, for example, an "all monies" mortgage was found to indefeasible notwithstanding a *non est factum* defence, but because the separate guarantee that created the obligation secured by the mortgage was set aside by reason of *non est factum* there was found to be no monies owing by the mortgagor to the mortgagee to be secured by the indefeasible mortgage.

3. Deeds of Loan

In the case of separate Deed of Loan, the mortgagee may be in a better position than above. Provided monies were loaned to the mortgagor, this will constitute a debt due by the mortgagor to the mortgagee, which obligation will fall within the ambit of an "all monies" mortgage regardless of whether the Deed of Loan itself is set aside. If the monies are not actually advanced to the mortgagor, however, but are stolen by a forger or similar, then the mortgagee will lack this comfort.

4. Indefeasibility issues of using extraneous documents

In the light of the above, the use of "all monies" mortgages is not as desirable as their popularity would suggest. Although the successful argument in *PT Ltd v Maradona Pty Ltd* appears not to have been often raised as an answer to indefeasibility, it is likely to be applicable to many mortgage transactions and will doubtlessly be increasingly exploited in the wake of that decision.

5. All monies clauses in general

Both Young J in *Estoril Investments Pty Ltd v Westpac Banking Corporation* (1993) 6 BPR 13,146 and Santow J in *Re Modular Design Group Pty Ltd* (1994) 35 NSWLR 96 have adopted the following 9 guidelines in interpreting widely drawn covenants referred to as "dragnet clauses", being clauses securing all monies which have and may in the future be advanced to the mortgagor:

1. The mortgage will only secure advances made or debts incurred in the future if the past debts are identified.
2. Only debts of the same type or character as the original debt are secured by the mortgage.
3. A dragnet clause will often cover future debts if documents evidencing those debts specifically refer back to the clause.
4. If the future debt is separately secured it may be assumed that the parties did not intend that it also be secured by the dragnet mortgage.
5. The clause is inapplicable to debts which were originally owed by the mortgagor to third parties and which were assigned to or purchased by the mortgagee.
6. If there are several joint mortgagors only future debts on which all of the mortgagors are obliged or at least which all were aware will be covered by the dragnet clause.
7. Once the original debt has been fully discharged, the mortgage is extinguished and cannot secure further loans.

8. If the mortgagor transfers the land to a third party, any debt which the original mortgagor incurs thereafter is not secured by the mortgage.

9. If the real estate is transferred by the mortgagor, advances subsequently made to the transferee are not secured by the mortgage even if the transferee expressly assumed the mortgage.

F. Construction of mortgage covenants

1. No general rules

There are no general rules of construction which apply specifically to mortgages as apart from any other contract. A mortgage is to be construed in a similar manner to any other contract.

2. Extrinsic evidence admissible to resolve ambiguities

Extrinsic evidence is admissible where the meaning is unclear; see Real Estate (Australia) Ltd v St Martin's Investments Pty Ltd (1980) 144 CLR 596, Gilberto v Kenny (1983) 48 ALR 620, Codelfa Construction Pty Ltd v State Rail Authority for NSW (1982) 149 CLR 337.

3. Typographical mistakes

Obvious typographical mistakes will be ignored by the court without the necessity of rectification proceedings – see *Re United Pacific Transport Pty Ltd* [1968] Qd R 517[1].

4. Clauses which trigger a right to call up the mortgage

It is sometimes said that clauses which trigger the right of the mortgagee to call up the principal are read down where the triggering event is set aside or void. There are two views as to whether a triggering event is always sufficient to entitle the other party to exercise its rights on default. The first is that the mere fact that there is a triggering event entitles the other party to exercise its rights. The other view is that in the triggering event cannot be taken advantage if:

i) the triggering event is set aside or void, such as if a Bankruptcy notice was set aside as an abuse of process: *Permanent Trustee Co Limited v Cormack* (1920) SR (NSW) 1, or

ii) the triggering event has subsequently been remedied: *Paul Kennedy Transport Pty Ltd v ANZ Banking Group Limited* 12 May 1993, Young J, Unreported.

In some cases a term will be implied into a contract that a party must not make use of a triggering event except if it is "reasonable" to do so: *Renard Constructions (ME) Pty Ltd v Minister v Public Works* (1992) 26 NSWLR 234; *Hughes Bros Pty Ltd v Trustee of Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91.

It is ultimately a matter of construction of any given mortgage as to whether a triggering event can be utilised in any given case. Given that terms will not normally be implied which are contradictory to express terms of a contract, a mortgage could be drafted to specify that a mortgagee could rely on any triggering event whether or

[1] In this case the word "mortgagor" was substituted for "mortgagee"

not the event is voided or rendered otherwise of no effect, and that the mortgagee can so rely whether or not it may be considered reasonable so to do.

See also the discussion below on Acceleration clauses.

5. Widely drafted covenants

The law has no general policy in relation to widely drafted covenants. A widely drafted covenant is to be construed as any other covenant: if there is ambiguity the objective intention of the parties will be looked at. A court will not necessarily read down a wide covenant simply because it is drafted widely.

6. Covenants authorising the mortgagee to fill in the blanks

A contract cannot have a valid term authorising one party to alter the contract as the party sees fit. One cannot, therefore, have a valid mortgage with terms left blank and a clause authorising the mortgagee to fill in these terms however it considers appropriate.

A mortgage can, however, make the mortgagee the attorney of the mortgagor for the purposes of completing formal documentation, provided there is prior agreement as to the contents of the documentation.

7. Covenants by the mortgagee

The covenants in a mortgage are usually given by the mortgagor. However covenants can be given by a mortgagee. For example where the advance under a mortgage is to be made in instalments, the mortgagee gives covenants to make the advances as they fall due[2].

8. Mortgages which secure sums calculated in foreign currencies

There is nothing to prevent a mortgage referring to an obligation to be met in a foreign currency. Under s 34 of the Stamp Duties Act, an instrument can be stamped in accordance with a statement of current rate of exchange, with provision that if the statement proves untrue, the deficient duty may be recovered along with a fine.

9. Collateral covenants

Generally speaking, any covenants contained in any agreement between parties are enforceable provided they are not rendered unenforceable by some rule of law or equity or by a statutory provision (typically a provision that precludes the ability of parties to contract out of a provision of the statute). In some circumstances covenants conferring a collateral advantage upon the mortgagee may be held to be unenforceable after redemption (see below) but otherwise the above general principle applies.

If any covenants are to be included in a mortgage which would normally have no place in such a document, are onerous, and are likely to take the mortgagor by surprise, care must be taken by the mortgagee to ensure that such the contents of such covenants are specifically brought to the attention of the mortgagor. Failure to do so would greatly increase the chance of success of a Contracts Review Act, unconscionability, or misrepresentation defence.

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[2] See *Murphy v Zomonex Pty Ltd* (1993) 31 NSWLR 439 A case where the mortgagee defaulted on its covenant to make installments of principal

A supplier including a covenant in a mortgage compelling the mortgagor only to purchase in future from that supplier will constitute an offence under s 47 of the Trade Practices Act if the restriction is held to be anti-competitive (which it is likely to be).

10. Attornment clauses

An attornment clause is a covenant providing that the mortgagor is to be treated as the tenant of the mortgagee with respect to the security. This clause was important in Old System mortgages where the mortgagee became the legal owner of the premises yet is was usually desired that the mortgagor remain in occupation, so a tenancy was created. Under the Torrens System, no such device is necessary, as a mortgage is in the nature of a charge rather than a legal conveyance and the mortgagor thus retains the right to possession of the premises after the mortgage has been executed without any need to be granted a tenancy by the mortgagee.

Whether simply out of habit or as an attempt to give the mortgagee the right of distress against the tenant (a right, now abolished, which enabled a landlord to seize chattels from the tenant to satisfy liability for unpaid rent), some Torrens System mortgages continued to use attornment clauses notwithstanding their inapplicability given the nature of Torrens System mortgages. The High Court in Partridge v McIntosh & Sons Ltd (1933) 49 CLR 453 noted that there could in truth be no tenancy between mortgagor and mortgagee of Torrens System land, but that an attornment clause could still effect an estoppel between mortgagor and mortgagee forcing them, as between themselves, to treat each other as landlord and tenant.

With distress for rent now abolished, and with tenants often enjoying additional statutory protections under, for example, the Residential Tenancies Act and the Retail Leases Act, an attornment clause is likely to provide a mortgagee with no practical advantages but rather expose the mortgagee to the risk of imposing further statutory fetters on his powers. In the circumstances, the inclusion of an attornment clause in a modern day Real Property Act mortgage is not recommended.

11. Dispute resolution or arbitration clauses

A mortgage can specify any mechanism for the resolution of disputes between the parties thereto, but such mechanism does not oust the jurisdiction of courts to determine the dispute regardless if a party chooses to bring the dispute before that court. Indeed s 55 of the Commercial Arbitration Act prevents one from even enforcing a condition that litigation cannot be commenced until the parties have first attempted arbitration of their dispute. In the circumstances, providing in the mortgage for alternative dispute resolution procedures is of little utility.

12. Collateral securities

In the case of a mortgagee accepting collateral securities, it is common to include a provision in each security document stating that the security is collateral with the other (stated) securities, and providing that default under any of the other securities is also deemed to be a default under the present security. This ensures that if any default is made, the mortgagee can choose which of the various securities it wishes to realise and in what order.

G. The rule against penalties

1. The rule against penalties

It has long been a principle of equity that if a person is in default under an agreement the innocent party is entitled to damages commensurate with that party's genuine loss, but that the innocent party should not be entitled to receive an additional windfall by reason of the default over and above the true damage incurred. Thus if an agreement contains a term entitling a party to recover a sum of money for breach of a term of the agreement which sum is greater than a genuine pre-estimate of the damages occasioned by the breach (which is referred to as "liquidated damages"), equity will strike down that term as a penalty.

2. Penalties verus liquidated damages

The difference between a penalty and liquidated damages was spelled out by the House of Lords in *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd* [1915] AC 79 at 86-88. The court will look at the substance of the matter, rather than the characterisation contained in the contract. It is said (p 86)

> "The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage."

"One of the most ancient instances" of a penalty is identified at p 87 as being where

> "the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid"

although the recovery of interest on the unpaid sum was permissible.

3. Reducing interest upon prompt payment is not a penalty

It is now well established that a term that interest will be reduced upon punctual payment is not a penalty. *Astley v Weldon* (1801) 126 ER 1318 notes at 1322-3:

> "It is a well-known rule in equity, that if a mortgage covenant be to pay 5l per cent and if the interest be paid on certain days then to be reduced to 41 per cent the Court of Chancery will not relieve if the early day be suffered to pass without payment; but if the covenant be to pay 41 per cent and if the party do not pay at a certain time it shall be raised to 51 there the Court of Chancery will relieve."

This is presumably because reduction of interest for prompt payment is considered to provide an incentive for observance of the agreement rather than imposing an additional burden in a case of non-compliance. Although this line of reasoning might now be considered questionable in that it is arguably a triumph of form over substance, the principle is too well established to be easily discarded- as seen above it was already considered "a well-known rule" over 200 years ago. It is for this reason that mortgages containing a higher default rate and a lower non-default rate should be

drafted to provide that interest is to be paid at the higher rate except in defined circumstances where the lower rate may be paid, rather than providing that interest is to be paid at the lower rate but that the rate shall increase if the mortgagor is in default.

4. Payment within 7 days

There is no legal reason why a mortgage needs to provide a grace period of 7 days with respect to each payment. Indeed, one should note that a regime providing that payments are due on the first day of each month but that the mortgagor is allowed a further 7 days to pay is effectively only a more complicated way of saying that payments are due on the eighth day of each month with time to be of the essence.

It is likely, however, that the formula involving payment on the first day with 7 day grace period is psychologically more effective in causing a mortgagor to pay by the eight day than a direct statement that the mortgagor need not pay until the eighth day.

H. Void covenants

1. The reasons for being void

Covenants can be void or unenforceable for a great many reasons. Naming only some of the most common reasons why a covenant may become void or ineffective, it may infringe a statutory provision drafted to prevent contracting-out (most commonly by virtue of s 58A of the Real Property Act in cases where the covenant in question purports to exclude the need to serve s 57(2)(b) notices in any circumstances); it may be so poorly drafted so as to be void for uncertainty; or it may be set aside by a court for its unfairness under any one or more of a variety of enactments (for example the Contracts Review Act, Trade Practices Act, Fair Trading Act, Consumer Credit Code) and/or by reason of conflict with general law equitable principles (such as the covenant being unconscionable).

2. Severance

If a term in an agreement is void or unenforceable, the remaining terms will still be effective and enforceable provided that, on the proper construction of the agreement, that is held to be the intention of the parties. The key question was stated in *McFarlane v Daniell* (938) 38 SR 337 at 345 as being whether the promises in an agreement are "so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature"- if so, the agreement as a whole is unenforceable, but if the elimination of the void promise "changes the extent only but not the kind of the contract" then the promise is merely severed and the remaining promises are enforceable.

3. Severance clauses

Although it is hard to imagine a court (except in the most extreme of cases) concluding that the ineffectiveness of a single covenant of a mortgage was intended to make all the other covenants also ineffective, the inclusion of a clause in the mortgage expressly stating that any void or ineffective clause is to be severed is a prudent measure so the parties' intention is expressly stated.

I. Continuing covenants

1. In an ancillary agreement secured by the mortgage

Whether or not a covenant can outlast redemption of a mortgage depends upon several matters. If the covenant is in an agreement forming a transaction separate from the mortgage, there is no difficulty with the covenant persisting after redemption of the mortgage.

2. In the mortgage memorandum

Even if the covenant is contained within the mortgage document, if on its proper construction the covenant can be construed as independent of the mortgage rather than being a term thereof, it can continue. If, however, the covenant is held to be a term of the mortgage then it is liable to be struck down as unenforceable if it fails to meet the test in *Krelinger v New Patagonia Meat and Cold Storage Company Ltd* [1914] AC 25 at 61.

3. Deed of release

No covenant is effective to oust the jurisdiction of the court to entertain a claim against the mortgagee for breach of contract, whether that claim is brought before or after discharge. The mortgagee can, however, seek from the mortgagor on discharge a Deed of Release releasing all such claims that the mortgagor might otherwise possess against the mortgagee. If the mortgagor then refuses to execute such a Deed, that may give the mortgagee reasonable grounds to anticipate an action for account against the mortgagee, and thereby entitle the mortgagee to add to the discharge figure a further amount to be held as security by the mortgagee in relation to such costs the mortgagee may incur in defending such an action, in accordance with *Project Research Pty Ltd v Permanent Trustee of Aust Ltd* (1990) 5 BPR 11, 225.

J. Personal covenants

1. Continuing cost clauses

Covenants by a mortgagor in a mortgage have a dual role, being contractual promises which may be enforced personally against the mortgagor by the mortgagee, and also defining the mortgagee's interest in the land. Normally covenants in a mortgage are intended to operate only until the mortgage has been fully discharged, but if it is clear that the parties intend otherwise covenants can continue to be effective after discharge provided the test in *Krelinger v New Patagonia Meat and Cold Storage Company Ltd* [1914] AC 25 at 61 (set out previously) is met. I consider that a covenant that the mortgagor would pay on an indemnity basis the mortgagee's costs of relating to any dispute with respect to the mortgage occurring after discharge would meet the above test and be effective.

2. Rights in personam

The expression "personal covenant" is a reference to the contractual aspect of a covenant in a mortgage, as opposed to its role as defining the mortgagee's interest in the land. All covenants in a mortgage are personal covenants to the extent that they are enforceable against the mortgagor in an action *in personam*. Frequently, however, the words "personal covenant" are used as shorthand to indicate in particular the

mortgagor's personal covenant to repay the mortgage. A covenants may be both personal and defining of the mortgagee's interest in the security.

3. Express identification
There is no need to state (or utility in stating) which covenants are personal and which affect the land as that is apparent from the nature of the covenants in question.

4. Forgery
In cases of forgery, *non est factum* and similar where the mortgage is only saved by reason of indefeasibility under s 42 of the Real Property Act, the "personal" aspect of the mortgage covenants is lost, with them continuing to exist only in their role as defining the mortgagee's indefeasible interest in land. To the extent the covenants define that interest, they become protected by indefeasibility under s 42: see *PT Ltd v Maradona Pty Ltd* (1991) 25 NSWLR 643.

5. Registration of a discharge and personal covenants to repay
Provided it is clear that the parties intend a covenants to continue to be effective after discharge of a mortgage, and provided the test in *Krelinger v New Patagonia Meat and Cold Storage Company Ltd* [1914] AC 25 at 61 is met, a covenant will continue to be enforceable after discharge. The best way to make clear the intention of the parties is to state "This covenant is to continue in effect notwithstanding discharge of this mortgage", or words to that effect.

K. Enforceability

1. Onerous clauses secreted into voluminous registered memorandums
The fact that a mortgagor would, in the normal course of events, probably never read the memorandum to a mortgage means that the mortgagor is particularly vulnerable to any unusually onerous clauses that might appear in that memorandum.

The inclusion of such clauses in the memorandum may consequently assist a mortgagor in demonstrating that entry into the mortgage was unfair and should be set aside or varied under the Contracts Review Act, and/or that the mortgage should not be enforced by reason of unconscionability.

This danger can be greatly reduced by providing the prospective mortgagor with a full copy of the memorandum at an early stage (along with the unexecuted mortgage documents), thus enabling the mortgagor to not only read the memorandum prior to execution of but to seek legal advice with respect to its contents. Alternatively any onerous clauses should be pointed out in a brief plain English letter which the mortgagor signs.

2. The standing of letters of offer or epitomes of mortgage
Unless the mortgage incorporates into itself some other document (such as an offer of loan) then for the terms of the mortgage are to be found in the mortgage rather than in any loan offer, epitome of mortgage or other document.

If the mortgage does import another document which document repeats the same information as that set out in the mortgage (such as the interest rate and principal amounts) it is wise to have a clause in the mortgage stating that one or the other shall prevail in the event of an inconsistency.

3. Pre-contractual documents which mislead as to the mortgage terms

Pre-contractual documents, like loan offers and documents evidencing negotiations between the parties can, even if they have no importance in construing the terms of the mortgage itself, be of significance in relation to such matters as unconscionability, misrepresentation, and/or Contracts Review Act defences. If, for example, pre-contractual documents lead a mortgagor to believe that the terms of the mortgage are going to be significantly more advantageous than is reflected in the subsequent document, and the mortgagee does not alert the mortgagor to the changes in question, then the mortgagor may be successful in setting aside (or, more likely, varying) the mortgage by reason of one of the above defences.

4. Requiring the mortgagor to obtain independent legal advice

The existence of legal advice for the mortgagor makes it more difficult for the mortgagor to successfully run such defences as it is more likely that the changes will be detected and hence not mislead the mortgagor. However in practice legal representation for borrowers is not always as thorough as it ought to be, a mortgagee can be no means assured that any misrepresentations contained in pre-contractual documents will be cured simply by ensuring that the mortgagor is legally represented.

In *Small v Gray* 5 March 2004, McDougall J, Unreported, a mortgagor received advice with respect to a mortgage transaction from both a solicitor and an accountant. The court found that the advice was inadequate in each case. Although the mortgagees were unaware of the inadequacies of the professional advice, these inadequacies (albeit coupled with what were found to be failings in the mortgagees in relation to making enquiries concerning the mortgagor's capacity to repay the loan), were of great assistance to the mortgagor in having the mortgage effectively set aside as against her interest in the security.

5. Rectification

There is also the possibility that a court will take the view that the words of the mortgage (if they are inconsistent with the wording of all pre-contractual documentation) were only included by reason of a drafting error of some sort, and then "rectify" the terms of the mortgage to have them accord with what was apparently the true agreement between the parties. Rectification is, however, a difficult matter to make out, and will only be ordered by a court if it is persuaded that both parties intended to make an agreement that is in different terms to that recorded in the mortgage document.

6. Arcane language

The use of highly technical language in a mortgage and/or memorandum can make it difficult for a layman mortgagor to understand the true terms of the agreement being made with the mortgagee. This fact can assist in the making out of an unconscionability or Contracts Review Act defence. Ensuring that a mortgagor receives legal advice can considerably reduce the risks for a mortgagee as the advice may either rectify the mortgagor's lack of understanding or at least enable the mortgagee to maintain that it believed that the lack was rectified (and hence the mortgagee did not act unconscionably), but the risks cannot be removed altogether by this means.

7. Covenants imperative for enforcement

In order to be enforceable, a mortgage needs to identify one or more obligations owed by the mortgagor to the mortgagee, and provide that those obligations are secured by the mortgage. If a court cannot identify any obligation secured by a mortgage, the court will set aside the mortgage notwithstanding it may have been registered: see *Tsan v Electronic Resources Aust Pty Ltd* 24 July 1997, Hodgson J, Unreported.

8. Loan Repayment Ability Declarations

There is little (if any) utility in a lender providing to a borrower a pro-forma document in which the borrower certifies that the borrower can repay the monies that are to be advances. Regardless of the form of such documents, and regardless of whether those documents are in the nature of statutory declarations or otherwise, a court is unlikely to attach any significance to such a certification, as the evidence will inevitably be that the borrower signed the document mechanically with all the other "formal" documents requested by the lender to finalise the loan.

Causing a borrower to execute a declaration of this nature will not save a transaction that would otherwise be set aside or varied under the Contracts Review Act or for unconscionability, whether by way of estoppel or otherwise.

9. Accountant's certificates

Of greater value to a lender is a certificate from the borrower's accountant to the effect that the accountant has discussed the loan with the borrower and ascertained that the borrower is capable of repaying the loan, as (absent forgery) requiring such a certificate ensures that the borrower will receive advice from an accountant in relation to the loan.

10. Excluding liability for loss whilst mortgagee is in possession

A mortgage may seek to exclude liability of the mortgagee to the mortgagor for loss to the mortgagor arising out of damage to the security or to the mortgagor's chattels caused by the negligence of a mortgagee in possession. Although court's generally attempt to read down such exclusion clauses as much as possible, there is no reason in principle why a clearly worded clause of this nature would not be effective, at least to exclude actions for negligence that was not gross or willful. The clause might read:

> "The mortgage shall not be liable to the mortgagor for any damage to the Land, or any improvements to the Land, or to any chattels situated on the Land, which damage occurs after the mortgagee has taken possession of the Land, whether or not the damage has been caused by the negligence of the mortgagee and/or agents of the mortgagee, even if that negligence be gross or willful."

L. Acceleration clauses

An acceleration clause is a covenant in a mortgage that permits a mortgagee, upon the happening of specified events, to call in the mortgage and to demand the repayment of the principal, even though the principal would otherwise only be repayable at a future date.

1. Slowed by 30 days

By virtue of s 57(5) of the Real Property Act, an acceleration clause "has no force or effect" in relation to a default until a power of sale becomes exercisable in relation to that default. That means that a s 57(2)(b) notice must have been issued in relation to the default and not complied with for a period of 1 month (although for non-monetary defaults, the need to serve a notice can be excluded by express provision in the mortgage).

2. The need for precisely worded acceleration clauses

As the ability to accelerate principal is a major matter under any mortgage, the events that may trigger acceleration should be precisely defined. Failure to do so may give rise to the implication of additional terms into the mortgage that qualify the triggering event, such as the implied term that the mortgagee should act "reasonably" that has previously been referred to. A very vague term such as "the mortgagee can immediately demand repayment of the principal if in the mortgagee's opinion the mortgagee's investment is at risk in any way and for any reason" would almost certainly be construed such that the mortgagee had to form this opinion reasonably, and this would lead to the mortgagor always being able to challenge acceleration on the grounds that the opinion was unreasonably formed. A mortgage that contained the above clause and went on to expressly state that the mortgagee did not have to be reasonable in forming its opinion would probably be struck down as unconscionable, as the mortgage could then effectively demand repayment of principal any time the mortgagee sought fit without any challenge to that decision.

3. Acceleration clauses can be penalties

A clause that does no more than accelerate the date of payment of a debt that would otherwise be payable at a later time is not a penalty, but a clause that not only accelerates a debt but requires some further premium to be paid by the mortgagor that is in excess of any damage that the mortgagee is likely to suffer will be a penalty: *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983 52 CLR 359.

4. Events triggering acceleration clauses need not be a fundamental breach

A mortgage can (and should) define the events that give rise to the ability of the mortgagee to accelerate the repayment of principal. Provided the breach of a given covenant is clearly identified as giving rise to a right to accelerate, and provided that any required s 57(2)(b) notice with respect to that default has been served and not complied with then the principal may be accelerated whether or not breach of that covenant would be considered "fundamental".

5. Payment dates

If a contract contains a time stipulation (being that a given act is to be performed by a given date), then that time stipulation may or may not be strictly enforceable depending upon whether, on the proper construction of the contract, time is to be "of the essence" with respect to that time stipulation. If time is of the essence, then any lateness is a breach of the contract giving rise to a right to terminate. If time is not of the essence, then unless time is then made of the essence by the service of a notice to complete, or unless performance is extremely late, no termination is possible.

Parties are free to agree that payment dates, just as with any other time stipulations, are to be strictly complied with- in effect, making time of the essence with respect to those dates. If a mortgage clearly indicates that any lateness in payment, however small, is a default giving rise to a right to take possession and exercise power of sale, then this is an enforceable provision.

6. Unearned interest

The general rule is that the mortgagee can only claim interest on principal to the date of payment of that principal, and cannot claim further interest to the original repayment date under the mortgage: see *Branwood Park Pty Ltd v Willings & Sons Pty Ltd* [1976] 2 NSWLR 149; (1977) 1 BPR 9534 (CA). It follows that the activation of an acceleration clause will not add unaccrued interest to the principal. If the mortgage contains a covenant to the effect that a default makes the mortgagor liable to pay unaccrued interest for the unexpired term of the laon, that covenant will be struck down as a penalty: *Wanner v Caruana* [1974] 2 NSWLR 301.

M. Monies included in the mortgage debt

1. The cost of effecting improvements to the security

A mortgagee in possession may effect improvements to the security. The general rule in such a case is that the mortgagee is entitled to be repaid the cost of those improvements if the mortgagor has consented to, or acquiesced in, the mortgagee making the improvements. If there is no consent or acquiescence by the mortgagor, the mortgagee is nevertheless entitled to be repaid the cost of the improvements to the extent they have enhanced the value of the security: see *Shepard v Jones* (1981) 21 Ch D 469. Although this is the general rule, Holland J in *Matzner v Clyde Securities Ltd* [1975] 2 NSWLR 293 states that each case must be considered on its own merits, and the mortgagee is not in the same position as an owner who may spend whatever it likes, but rather must ensure that the expenditure is not disproportionate to the value of the security and that it is in the nature of improving the state of the security in order to realise its value by sale, rather than altering the nature of the security property. An example given by His Honour of appropriate expenditure is when partly finished buildings on the land are completed by the mortgagee.

2. Lending to developers

A registered mortgagee has under the general law the right to possession of property on default, and, the right to improve the property by completing building works already commenced and then to recover from the sale proceeds the cost of those improvements to the extent that they have increased the value of the property.

Notwithstanding these general law rights, there is some sense in including a covenant in which the need to complete buildings is likely to arise, to expand upon the general law right. A mortgage might provide:

> "In the event that the mortgagee takes possession of the Land, the mortgagee may effect such improvements to the Land as the mortgagee sees fit, including but not limited to the completion of any building works in progress on the Land when possession is taken. All monies expended by the mortgagee in effecting those improvements shall be added to the debt due under this mortgage regardless of the extent to

which such monies have improved the value of the Land so long as the mortgagee at the time of incurring the expense was bona fide in expending to improve the value of the Land."

3. Application fees and valuation fees

It is possible for a mortgage to secure such fees as a loan application fee and a valuation fee - indeed an "all monies" mortgage would secure all debts owed by the mortgagor to the mortgagee without the need for any specific inclusions. However the mortgagor would have had to have agreed to them somewhere.

4. Mortgages registered solely to recover fees

In the case of a loan not proceeding for reasons of an inadequate valuation or otherwise, the mortgagee could register a mortgage securing the aforementioned fees, provided the mortgagor had executed such a mortgage and had agreed that such a mortgage could be registered in those circumstances.

5. Costs of establishing the loan

Under the common law right of a mortgagee to recover its costs under the mortgage does not extend to costs incurred prior to entering the mortgage, such as costs of negotiating the loan or drafting the mortgage documents: see *Wales v Carr* [1902] 1 Ch 860. There is nothing, however, to stop the mortgagee expanding its common law rights in this regard by way of express covenants in the mortgage.

***6.* Legal costs of enforcement**

The common law rule governing the recovery by a mortgagee of its legal costs is that it is entitled to those costs on a party and party basis, not a solicitor and client basis, but this rule may be varied by agreement to the contrary: see *Re Shanahan* (1941) 58 WN (NSW) 132. A mortgagee should thus include within a covenant that deals with the recovery of mortgagee's legal costs the sentence "The mortgagee's costs shall be recoverable on a solicitor and own client basis", or "The mortgagee's costs shall be recoverable on an indemnity basis", which expressions are equivalent for practical purposes. This is because if a mortgage provides for a full indemnity of all the costs of a mortgagee, such a provision will almost invariably be construed as referring to only such costs as are reasonably incurred by the mortgagee, and if a broader construction is arrived at, the provision will not be enforceable: see *Gomba Holdings Ltd v Minories Finance Ltd (No 2)* [1993] Ch 71.

7. Cost incurred improving the security – as against subsequent mortgagees

The general rule emerging from such cases as *Matzner v Clyde Securities Ltd* [1975] 2 NSWLR 293 in relation to the recovery by a mortgagee of the value of improvements to a security has been discussed above. In *Matzner*, it was noted that recovery of such costs under the general rule avoids the rule against tacking by first mortgagees, enabling a first mortgagee to recover the cost of such improvements at the expense of a second mortgagee, even when the monies where expended by the first mortgagee after entry into the second mortgage. However improvement costs that were covered by a mortgage covenant but did not come within the general rule would not be accorded this priority over the interests of subsequent mortgagees.

8. Judgement debts

Some mortgages include a mortgage a clause which says "You must pay any judgements the mortgagor gets against you and such judgements will form part of the

mortgage debt" this would (subject to any claim for relief under the Contracts Review Act or unconscionability) be an effective clause. It is, however, narrower than the an all monies clause and so is in most cases superfluous.

N. Redemption

1. Statutory entitlement to early redemption

S 93 of the Conveyancing Act (which applies in relation to Real Property Act mortgages) gives a mortgagor the right to early redemption, however the section further provides that:

> "in such a case the mortgagor shall pay to the mortgagee, in addition to any other moneys then owing under the mortgage, interest on the principal sum secured thereby for the unexpired portion of the term of the mortgage"

Sub-section (3) precludes contracting out of this right of early redemption, however if a mortgage provides early redemption terms more favourable to the mortgagor than s 93, the mortgagor can rely on the terms of the mortgage rather than the less favourable statutory right (see *Steindlberger v Mistroni* (1992) 29 NSWLR 351).

2. Statutory entitlement to late redemption

Under the general law there was a rule that if the mortgagor did not redeem on time, and the mortgagee did not call up the mortgagee for six months then the mortgagee could not redeem without giving six months notice (see Smith v Smith [1891] 3 Ch).

S 92 of the Conveyancing Act (which applies to Real Property Act mortgages) is the statutory successor to the old "six month rule". The new rule differs from the old in that it involves a 3 month period (not 6 months) and obliges the mortgagee to give notice to the mortgagor (not the mortgagor to the mortgagee).

S 92 of the Conveyancing Act applies to the situation in which:

i) the term of the mortgage (along with any renewals of the mortgage) has expired;
ii) the mortgagor is in default with respect to the repayment of the principal sum;
iii) apart from the default with respect to the repayment of principal, the mortgagor is not in default under the mortgage; and;
iv) the mortgagee has accepted interest from the mortgagor for at least three months from the date the mortgage expired.

If all the above conditions apply, the mortgagee is not entitled to "take proceedings to compel payment" of the principal sum, "or for foreclosure, or to enter into possession, or to exercise any power of sale, without giving to the mortgagor three months' notice of his or her intention so to do".

3. Redemption must not be more burdensome than the original debt

A requirement that a mortgagor can only redeem a mortgage by paying a premium over and above the amount of principal owing is a collateral advantage, and is only

enforceable if, as provided in *Krelinger v New Patagonia Meat and Cold Storage Company Ltd* [1914] AC 25 at 61, it is not:

(1) unfair and unconscionable, or
(2) in the nature of a penalty clogging the equity of redemption, or
(3) inconsistent with the contractual and equitable right to redeem.

A premium in the nature of interest due, or a reasonable premium payable on redemption in lieu of interest being charged, does not offend the above rule, but if a further premium is specified by a mortgage covenant as being payable on redemption over and above the mortgage debt plus interest accrued, then the covenant will not be enforceable: *Cityland and Property (Holdings) Ltd v Dabrah* [1968] Ch 166. Thus a mortgage could not, for example, validly require a mortgagor to repay on redemption 150% of the monies originally advanced to the mortgagor if the mortgagor also had an obligation on top of that to pay interest on the loan.

4. Once a mortgage always a mortgage

The maxim "once a mortgage, always a mortgage" refers to the rule, as stated in *Fairclough v Swan Brewery Company Ltd* [1912] AC 256 at 570, that

> "equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption"

In *Samuel v Jarrah Timber and Wood Paving Corporation Ltd*, the above rule was applied so as to void an option granted to the mortgagee as part of a mortgage transaction to purchase the security, as if the mortgagee exercised that option the mortgagor would lose its right to redeem the mortgage. In that case the House of Lords bemoaned the fact that the rule was thereby voiding part of a "perfectly fair bargain", but considered that the rule was too well established to be ignored.

Young J in *Westfield Holdings Ltd v Australian Capital Television Pty Ltd* (1992) 32 NSWLR 194, had no such compunction and was prepared to do more than merely complain about the illogicality of the rule, determining at p 202:

> "In my view, in 1992, the rule only applies where the mortgagee obtains a collateral advantage which in all the circumstances is either unfair or unconscionable."

This passage has since been cited with approval by Santow J in *Re Modular Design Group Pty Ltd* (1994) 35 NSWLR 96.

5. Prepaid interest

As previously discussed, the right to early redemption provided by s 93 of the Conveyancing Act is at the expense of the mortgagor paying the interest that would otherwise be paid for the remainder of the loan period. Unless the mortgage provides otherwise, early redemption by the mortgagor does not deprive a mortgagee of any entitlement to interest.

If, however, a mortgagee chooses to accelerate the principal due under a mortgage, then the mortgagee can only claim interest to the date of payment of that principal, and cannot claim further interest to the original repayment date under the mortgage: see *Branwood Park Pty Ltd v Willings & Sons Pty Ltd* [1976] 2 NSWLR 149; (1977) 1 BPR 9534 (CA). If interest was paid in advance, whether any part of this money would have to be repaid would depend on the drafting of the mortgage. If the mortgage provided, in effect, the monies paid were a pre-payment of monthly interest payments, then there would have to be a credit to the mortgagor for such interest as related to those months after the mortgage was repaid. If the mortgage provided that a lump sum of interest was to be paid in consideration for the loan, then as no part of the interest was referable to any particular part of the loan period there could be no repayment or credit claimed.

O. Leases

1. Leases not binding on the mortgagee

S 53 (4) of the Real property Act states:

> "A lease of land which is subject to a mortgage, charge or covenant charge is not valid or binding on the mortgagee, chargee or covenant chargee unless the mortgagee, chargee or covenant chargee has consented to the lease before it is registered."

It follows, therefore, that there is no need to include a covenant in a mortgage excluding the mortgagor's right to lease without the mortgagee's consent, as such a lease cannot by law be binding upon the mortgagee without the mortgagee's consent.

A mortgagor can purport to lease the security without the consent of the mortgagee. This does not produce a lease binding on the mortgagee, but the lease is binding upon the mortgagor: Commonwealth Bank v Baranyay [1993] 1 VR 589.

2. Registered leases

If there is a registered lease on the title of the security at the time the mortgage is granted, the mortgagee's interest is subject to that lease.

3. Notice of existing leases

If prior to execution of the mortgage the mortgagee learns that there is an unregistered lease, but that unregistered interest is not protected by a caveat, normally the mortgagee can simply proceed to register the mortgage and thereby gain priority over the tenant's interest.

This is because mere knowledge of the existence of an earlier unregistered interest that will be defeated or postponed by the registration of an instrument does not constitute fraud within the meaning of s 42 of the Real Property Act and so the mortgagee can obtain indefeasibility of the mortgage notwithstanding actual knowledge of an earlier unregistered interest. The Privy Council stated in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 106-7:

> "If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate

> and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear… The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest..”

It follows from the above that although mere knowledge of the unregistered interest at the time of registration does not constitute fraud, the existence of further circumstances might cause the registration to be fraudulent and thereby cause indefeasibility to be lost. Fraud might be found, for example, if the registration of the mortgage was part of a conspiracy between mortgagor and mortgagee to deprive a tenant under an unregistered lease of that tenant’s rights.

4. Refusal to consent to a lease

Unless a mortgage contains a covenant requiring a mortgagee to consent to a lease in specified circumstances (such as where it would be unreasonable to withhold consent), the mortgagee is free to withhold its consent regardless of the reasonableness or unreasonableness of so doing.

P. Waiver

Waiver of a mortgagees rights can occur either by way of election or by way of estoppel.

1. Waiver by election

Waiver by election occurs where a person has two (or more) alternative rights and elects one rather than another. This situation commonly arises with respect to a contract where there has been a breach giving one party the right to elect either to terminate the contract or to affirm the contract and keep it on foot. Once the person has elected to exercise one right rather than the other, the person is prevented from later deciding to exercise the alternative right, that right then being considered to have been “waived”.

2. Waiver by estoppel

Waiver by estoppel occurs when one party represents to a second party that the first party will not exercise a contractual right. If the second party then acts on that representation in such a way that the second party would consequentially suffer detriment if the contractual right were, contrary to the representation, subsequently enforced, then the first party is estopped from exercising that right, and again can be said to have “waived” the right. A right waived by estoppel is not necessarily lost altogether, but only to the extent necessary to remove any detriment the second party would otherwise suffer- for example, a mortgagee that has represented they it will not call up a mortgage thus causing a mortgagor to refrain from looking to refinance might be permitted nonetheless to call up the mortgage after allowing the mortgagor’s detriment to be cured through giving reasonable time for refinance to be effected.

3. Implied waiver

The form of waiver most relevant to mortgages is waiver by estoppel. A representation capable of founding an estoppel does not necessarily have to be express, but may be implied. A mortgagee refraining from exercising a right for a protracted period may be held to have made an implied representation that the right will never be exercised, and if the mortgagor has believed that the right will not be

exercise and has consequentially acted to the mortgagor's detriment, then the mortgagee may lose the right in question.

4. Implied waiver of right to interest or principal

In the case of the mortgagee leading a mortgagor to believe that no money is owing when really there is an outstanding balance, this is unlikely to lead to the loss of the right to recover the money as it is unlikely that the mortgagor will have suffered any detriment as a result other than additional liability for interest, and thus the detriment can be cured by simply estopping the mortgagee from claiming that additional interest.

Delays of many years in demanding repayment could have a more serious result, however, by barring recovery by a mortgagee by reason of the Limitation Act.

5. No waiver clauses

A clause in a mortgage to the effect that no covenant would be considered to be waived by the mortgagee unless the mortgagee gave a notice in writing to that effect might be of assistance in an otherwise borderline case in resisting an allegation that an implied representation had been made by a mortgagee that a right would not be exercised. Such a covenant would be of no use, however, when the words and/or actions of the mortgagee clearly constituted a representation notwithstanding the covenant, such as where the mortgagee or its agent informs the mortgagor orally that the mortgage is not in default.

Q. Covenants relating to service

1. Regarding service of possession proceedings

The requirements for service of any originating process in relation to Supreme Court proceedings is contained in Part 9 of the Supreme Court Rules. Under Part 9 Rule 2 that service must be personal (unless the court otherwise provides, for example making an order under Part 9 Rule 5 to permit the commencement of possession proceedings by affixing a copy of the originating process to vacant land). A solicitor may, however, accept service on a person's behalf by endorsement on the initiating process to that effect (Part 9 Rule 7).

The fact that a person may have agreed to accept service in some manner additional to the above does not make the service of originating process valid if served in that manner. Unless the originating process is served in accordance with the Supreme Court Rules, service has not been properly effected, regardless of what the parties might have previously agreed between themselves.

2. Regarding notices

Parties have limited ability to vary by agreement the statutory notice regimes of the Real Property Act and Conveyancing Act.

For Real Property Act mortgages, a notice is required under s 57(2)(b) of the Act when a registered mortgagee wishes, upon default by the mortgagor, to exercise power of sale or accelerate the repayment of principal under the loan. S 58A(1) of the Act provides that in the case of a default other than with respect to payment under the

mortgage, there is no need to serve a s 57(2)(b) notice if the mortgage has expressly dispensed with a notice in these circumstances. S 58A(2) states that

> "to the extent to which an agreement dispensing with notice or lapse of time expressed in such a mortgage or charge is not authorised by subsection (1), the agreement has no force or effect."

It follows that a s 57(2)(b) notice is always required when the default is a monetary default, regardless of the terms of the mortgage.

In relation to unregistered mortgages (governed by the Conveyancing Act), the equivalent to s 57(2)(b) is s 111(2)(b), and s 109(2) provides similarly to s 58A of the Real Property Act.

R. Subsequent mortgages

1. Covenants prohibiting further encumbrances

A clause can be put in a mortgage stating that the mortgagor cannot encumber the land. This is, however, merely a promise by the mortgagor to refrain from encumbering the land, and does not prevent the mortgagor encumbering the land in breach of the promise. The mortgage can make further encumbrance a default under the mortgage entitling the mortgagee to call up the principal and exercise power of sale, but, of course, often a mortgagor will encumber a property by an unregistered dealing of which the mortgagee has no knowledge.

2. Binding subsequent mortgagees

Although a subsequent mortgagee takes his interest subject to the prior mortgage he cannot be expressly bound. The covenants in a mortgage bind only the parties to that mortgage (typically a mortgagor and a mortgagee). Although the interests of subsequent mortgagees rank lower in priority than the interest of a first mortgagee, a subsequent mortgagee is in no way bound by any of the covenants in a first mortgage to which it is not party.

S. Transfers

1. Transfer of the land

A mortgage can provide that any assignment of a mortgagor's interest in land is a default and entitles the mortgagee to call up the mortgage. This clause makes it difficult for the owner of Real Property Act land to sell the land subject to the mortgage, as the new owner will be immediately obliged to surrender the land to the mortgagee.

Even if land is sold subject to a mortgage (thus effectively assigning the mortgage) the original mortgagor (ie the assignor) is still liable under the personal covenants contained in the mortgage and thus in effect becomes a guarantor of the mortgage debt: see *McDonald v Gardiner* [1933] VLR 129. The transferee is bound also to repay the mortgage debt, with the covenants to repay being considered to be "in the nature of covenants running with the land": *In re Burton*; *Ex parte The Union Bank of Australia Ltd* (1901) 27 VLR 437.

2. Transfer of the mortgage
Section 95 of the Conveyancing Act 1919 (NSW) gives any other mortgagee (prior or subsequent) the right to demand a mortgage be transferred into their name on the same terms as which the mortgagor is entitled to discharge. A requisition to this effect by a mortgagee will have priority over one under s94 by the mortgagor. If two mortgagees make competing requisitions the one with priority will prevail[3].

3. Mortgagor can demand a transfer
A mortgagor has the right to demand the mortgage be transferred to another mortgagee on the same terms on which he would have been entitled to discharge[4]. This right is extinguished if the mortgagee is or was at any time in possession[5]. This cannot be expressly negatived[6].

T. Right to possession

1. Registered mortgages
S 60 of the Real Property Act provides that on default in payment to the mortgagee, the mortgagee may enter into possession of the mortgaged property or bring proceedings for possession in the same manner as an Old System mortgagee. Absent contrary agreement, an Old System mortgagee has the right to possess the security regardless of default. It follows that on default in payment, a registered mortgagee under the Real Property Act has a statutory right of possession independent of any contractual right under the mortgage.

2. Equitable mortgages
An equitable mortgagee of Real Property Act land does not have a right to bring possession proceedings, but provided that the mortgage gives the mortgagee a contractual right to possession, the mortgagee can seek specific performance of that right and thereby obtain possession: *Mills v Lewis* (1984) 3 BPR 9421.

U. Possession of the CT

Although there is an almost invariable practice whereby a mortgagee obtains the certificate of title of the security on settlement of the mortgage, in the light of the decision in *Clarkson v Mutual Life Association of Australasia* (1879) 5 QSCR 165 the proposition that the mortgagee has a legal right, absent any provision in the mortgage, to custody of the certificate of title is at least questionable. In the circumstances, the mortgagee's right to do so should be ensured by way of a covenant in the mortgage, which covenant might be worded as follows:

> "The mortgagee has a right to custody of the certificate of title to the Land so long as this mortgage may subsist."

Failure to require custody of the CT can also seriously effect the priorities in the period between settlement and registration – see J & H Just Holdings Pty Ltd v Bank of New South Wales (1971) 125 CLR 546.

[3] Conveyancing Act 1919 (NSW) s.95
[4] Conveyancing Act 1919 (NSW) s.94(1)
[5] Conveyancing Act 1919 (NSW) s.94(2)
[6] Conveyancing Act 1919 (NSW) s.94(3)

V. Other covenants implied by the Conveyancing Act

1. The right to appoint a receiver

Section 109(1)(c) of the Conveyancing Act gives a mortgagee the right to appoint a receiver. There is little reason for appointing a receiver over real property in most cases because taking possession and utilising power of sale is generally a more convenient remedy.

A receiver's job is to manage the land in such a way as to generate income that is paid to the mortgagee to discharge indebtedness. Although a receiver may be given a power of sale under a mortgage, unlike a mortgagee the receiver cannot sell the land in his or her own name, but only in the mortgagor's name under power of attorney (which, unlike a mortgagee sale, is not effective to clear from the title the interests of subsequent mortgagees and chargees).

Unless the mortgagee is looking to satisfy the mortgage debt solely out of rents and profits earned with respect to the land, there is no advantage to the appointment of a receiver. If, however, the mortgagee would prefer to collect rents and profits rather than sell the land, the appointment of a receiver is generally superior to the mortgagee itself taking possession and collecting rents and profits; this is because the mortgage can specify that the receiver is to be treated as the mortgagor's agent rather than that of the mortgagee, and so the mortgagee is less likely to liable to the mortgagor for any mismanagement of the land.

2. Power of sale by an equitable mortgagee

There is a power of sale conferred by s 109 of the Conveyancing Act, but it is likely that this does no more than confer upon an equitable mortgagee the power to sell its equitable interest, not legal title to the land. In *Re Hodson and Howes' Contract* (1887) 35 Ch D 668, the English Court of Appeal held that s 21 of the Conveyancing and Law of Property Act 1881 (England) did not empower an equitable mortgagee, when exercising power of sale, to convey a legal estate in the land in question. It is further stated by the Court that a provision in the mortgage deed conferring a power of sale on an equitable mortgagee would be similarly limited to disposal of the equitable estate. In the circumstances, an equitable mortgagee. It appears likely the same construction would be applied in relation to the power of sale under the Conveyancing Act.

An equitable mortgagee can thus only convey the legal title in the name of a mortgagor under a power of attorney, or pursuant to a judicial sale order made by a court, being an order within the inherent jurisdiction of the Supreme Court analogous to an order for sale under s 103 of the Conveyancing Act (which section does not apply to Real Property Act land): see *Yarrangah Pty Ltd v National Australia Bank Ltd* (1999) 9 BPR 17,061. Such an order for sale can probably be obtained independently of whether any contractual power of sale is included under the mortgage, but given that the law on judicial sale by a mortgagee is in a state of development the more prudent course would be to include in every mortgage a covenant conferring a contractual power of sale for the sake of more abundant caution (even in the case of a mortgage that is intended to be registered, there is always a small possibility that registration will be somehow prevented and the mortgage will then subsist only as an equitable mortgage).

W. Other covenants implied by the RPA

1. The power of sale

S 58 of the Real Property Act provides a statutory power of sale in broad terms, and this power of sale can be relied upon by a registered mortgagee provided the notice provisions of s 57 of that Act have been complied with. There is thus no need for a registered mortgagee to rely on any mortgage covenant conferring power of sale.

An equitable mortgagee cannot rely on the statutory power of sale under s 58 of the Real Property Act.

X. Covenants implied by the Consumer Credit Code

S 169 of the Consumer Credit Code renders void any provision that seeks to avoid or modify any provision of the Code or seeks an indemnity for any loss or liability under the Code. The section goes further, however, and makes any credit provider that is party to a contract that seeks the above guilty of an offence. It follows, therefore, that if there is any real possibility that a mortgage will be held to be subject to the Consumer Credit Code, then the mortgage needs to be drafted to accord with the terms of that Code- in so far as seeking to avoid the provisions of the Code is an offence, it is not an acceptable approach to merely use a standard non-Code form or mortgage knowing that the covenants that offend the Code will be voided to the extend they are inconsistent with the Code.

The provisions of the Code and the Regulations are very numerous, and regulate aspects of loan transactions ranging from the interest rate (maximum of 48 % per annum) to the size of type (minimum 10 points), and it would double the length of this document to outline all the provisions that might potentially be contravened by a mortgage under the Code.