

Chapter 23: The remedies of mortgages

Assessment question

In 2014, Ketna borrowed £100,000 from the Doorway Building Society. The loan is secured by a first legal mortgage of Ketna's freehold house, 'Arkwrite Towers'.

In 2016, Ketna borrowed a further £50,000 from Princewest Finance Ltd, secured by a second legal mortgage on Arkwrite Towers. The interest on this loan is 12 per cent, and Ketna has fallen into arrears with her repayments to Princewest.

1. Explain whether it will be possible for Princewest to take possession of and sell Arkwrite Towers, and how such a sale would affect the position of the Doorway Building Society.
2. If Princewest sells Arkwrite Towers at less than its open market value, consider whether Ketna would have any remedy against either:
 - a) Princewest, or
 - b) the purchaser from Princewest.
3. How must Princewest apply the proceeds of any sale of Arkwrite Towers?

Specimen answer

(1) In order to take possession under the Criminal Law Act 1967, a mortgagee seeking possession in practice always seeks a court possession order. In the case of residential property, repossession is always illegal unless it takes place by order of the court. Thus, assuming that 'Arkwrite Towers' is a dwelling house, Princewest will need to apply to court for a possession order under s. 36 of the Administration of Justice Act 1970.

Section 36 AJA 1970 gives the court a wide discretion to adjourn possession proceedings, or to make a possession order but suspend its operation. The intention is to give the mortgagor time to find the money to pay off the mortgage. Possession will only be suspended or adjourned if it appears that the mortgagor will be able to repay the loan within a 'reasonable period'. Further protection is given to mortgagors of instalment mortgages by s. 8 of the Administration of Justice Act 1973 (most mortgages of dwelling houses are paid off by instalments). Section 8 authorises the court to suspend or adjourn possession in cases where it appears likely that the mortgagor will, within a reasonable period, be able to pay off instalments that are in arrears and catch-up with current instalment payments. A reasonable period will normally be around two years (depending upon the economic climate), although in *Cheltenham and Gloucester Building Society v Norgan* [1996], the Court of Appeal held that the court should take the full remaining term of the mortgage as its starting point in determining the 'reasonable period' for repayment. Waite LJ stated that courts should ask at the outset the question: would it be possible for the borrower to maintain payment-off of the arrears by instalments over that period?

Assuming that the building society has gained possession of the house it will now be able to sell, provided that the power of sale has arisen and has become exercisable. It will arise if the mortgage is by deed and if the legal redemption date has passed (given the length of time since the mortgage was granted the power of sale would certainly have arisen). The power to sell is exercisable if interest repayments are at least two months in arrears, as appears to be the case in the present scenario. Accordingly, it appears from the facts that sale will be possible if possession is secured.

The effect of a sale on the first mortgagee, Doorway, depends upon whether Doorway had allowed the sale to take place from its rights. If it did, Doorway will be entitled only to recover its share of the sale proceeds. If Doorway refused to allow the sale to continue free from its rights, the sale could still go ahead, but the house would yield greatly reduced sale proceeds, as any purchaser would be bound by the first mortgage.

(2) *Princewest*

The Court of Appeal in *Cuckmere Brick Co. v Mutual Finance Co.* [1971] Ch 949 held that in deciding when to sell, the mortgagee is entitled to consult its own interests to the total exclusion of the mortgagor's interests. However, having decided to sell at a particular time, in conducting the sale a mortgagee owes a duty of care to the mortgagor to obtain the best price reasonably obtainable at that time. If the mortgagee fails to obtain the best price he will have to account for the difference. The onus of proving that the mortgagee is in breach of this duty is on the mortgagor, unless the purchaser from the mortgagee has a personal connection with the mortgagee, in which case the onus is on the mortgagee to show that reasonable efforts were made to obtain the best price (*Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349).

(2) *Purchaser from Princewest*

If a mortgagee attempts to convey the property before the power of sale has arisen, any conveyance will be completely invalid. Once the power of sale has arisen, a mortgagee can convey a good title to a purchaser free of the mortgagor's rights, whether or not the power of sale has become exercisable. A purchaser in good faith from a mortgagee need satisfy himself only that the power of sale has arisen; he is under no duty to enquire whether the power has become exercisable.

A purchaser from the mortgagee is under no duty to pay the best price. Provided he acts in good faith he will get a good title, even if the mortgagee should have obtained a higher price by taking greater care. It would be acting in bad faith if the purchaser conspired with the mortgagee to purchase at an undervalue.

(3) *Princewest* is treated as 'trustee of the proceeds of sale'. Proceeds from the sale must be applied in the following order:

First, in paying off the total debt owed to the prior mortgagee, Doorway Building Society, if Doorway had permitted the sale to proceed free from its mortgage.

Secondly, in discharging any costs of sale and any attempted sale.

Thirdly, in discharging the total debt (capital and interest) owed to *Princewest*. Finally, the balance (if any) must be paid to Ketna. If *Princewest* departs from this strict order, it may be liable for breach of its trust.