

W.23(1) PRIORITIES OF MORTGAGES IN UNREGISTERED LAND

23.1 Who has the deeds?

23.2 Position where the mortgagee does not hold the deeds

23.3 Position where the mortgagee does hold the deeds.

The text of the book deals with how to ascertain priorities of mortgages in unregistered land only in outline. However, you may in practice come across a number of older mortgages of unregistered land and thus we set out here the rules that apply to such mortgages. These rules are largely a practical application of the unregistered land rules dealt with in chapter 5 of the book.

23.1 Who has the deeds?

The first question to ask in determining priorities in the case of unregistered title is:

Does the mortgagee hold the title deeds to the property?

Taking the title deeds is, in unregistered land, a standard precaution to prevent the mortgagor from making further dispositions of the property, and has the effect of ensuring that anyone dealing with the mortgagor is alerted to the fact that the land is already encumbered. Although cases can be imagined in which a fraudulent mortgagor could divide his title deeds in such a way as to be able to give a convincing set of deeds to more than one mortgagee, the general position will be that only one mortgagee can take the deeds, and that any other mortgagee will not have that protection.

23.2 Position where the mortgagee does not hold the title deeds

If the mortgagee does not take the title deeds when the mortgage is created, the mortgage is a registrable land charge. Such a mortgage, if legal, is known as a 'puisne mortgage' and should be registered as a class C(i) land charge. If it is equitable, it is a general equitable charge and registrable in class C(iii) (LCA 1972, s. 2(4)(i) and (iii)).

Registration constitutes actual notice (LPA 1925, s. 198) and so all later mortgagees, whether legal or equitable, will take subject to a mortgage which is protected in this way.

23.2.1 Registrable charge not registered

What happens if a registrable land charge is not registered? You will remember that some classes of land charge, if unregistered, are void only against the purchaser of the legal estate, while others are void against the purchaser of any interest (legal or equitable) in the land. Class C(i) and (iii) land charges, with which we are concerned here, fall into the second category, and thus any later mortgagee, whether legal or equitable, will take free of an earlier unregistered mortgage, or, in other words, will gain priority over it.

The basic position just described is quite straightforward, but there are two possible problems associated with it of which you should be aware:

23.2.1.1 Later return of deeds

Writers have asked what would happen if:

- (a) a mortgagee took the title deeds at the creation of the mortgage, which was therefore not a registrable land charge; but
- (b) later returned them to the mortgagor.

Does the mortgage then become registrable? The general view seems to be that it does not become registrable. This is based partly on considerations of convenience (for otherwise the mortgage would fluctuate between being registrable or non-registrable as the title deeds moved backwards and forwards between the parties), but

also derives support from the wording of the relevant sections. These refer to a 'deposit' of deeds, rather than to a 'retention', and so it is thought that an initial deposit of deeds is sufficient to make the mortgage unregistrable for the rest of its life (see further, Megarry (1940) 7 CLJ 243).

23.2.1.2 Two or more registrable charges

The second problem could arise only where there is more than one mortgage which is not protected by a deposit of deeds, and consequently there are two or more registrable land charges. In such a case, a conflict could arise between two statutory provisions: LCA 1972, s. 4(5) and LPA 1925, s. 97.

In general, there will probably be no difficulty about the operation of these two provisions. If the first mortgage is not registered, the second mortgagee will take free of it, and if he then registers his own mortgage as a land charge no complications can arise. There may, however, be a conflict between the two provisions if transactions occur in the following order:

- i. registrable mortgage A created;
- ii. registrable mortgage B created;
- iii. mortgage A registered; and
- iv. mortgage B registered.

According to LCA 1972, s. 4(5), B should take priority, because A was not registered when B was created. However, if you apply LPA 1925, s. 97, then A should take priority because it was registered as a land charge before B was registered.

Many have suggested solutions to this problem. See, for example—

Megarry (1940) 7 CLJ 243 at p. 255; and
Hargreaves (1950) 13 MLR 533 at p. 534.

(Note that the articles refer to LCA 1925, s. 13, which was in exactly the same terms as the present provision in the 1972 Act.)

Some writers favour the provisions of the LCA 1925, others support LPA 1925, s. 97. A third approach suggests that there is really no conflict between the two sections: s. 97 is seen as a signpost, pointing on to the LCA 1925 and saying, in general terms, that the priority of these mortgages shall depend upon the detailed provisions of that Act.

The point is a fascinating academic conundrum, on which each reader may form his or her own views. It is, however, perhaps worthy of note that there has been no reported decision on the point in the 87 years since the two conflicting provisions were first enacted.

23.3 Position where the mortgagee does hold the title deeds

In this case, one needs to begin by asking:

Is the mortgage legal or equitable?

23.3.1 Legal mortgages

In general, the legal mortgagee with the title deeds can rely on the basic principle that legal rights bind the whole world. This means that anyone who later acquires an estate or interest in the land will take it subject to an earlier legal right. This is so even if the later purchaser did not know of, or could not discover, the existence of that right. Although, in the case of a mortgage, he or she will usually be forewarned by the fact that the mortgagor cannot produce his title deeds. Thus a legal mortgage will take priority over all mortgages, legal or equitable, which are created after it, *unless the first legal mortgagee acts in such a way as to lose the natural priority*.

23.3.1.1 Loss of legal mortgage's natural priority due to mortgagee's fraud, misrepresentation or gross negligence

(a) Fraud

If a mortgagee colludes with the mortgagor in some kind of fraud on a later acquirer, it would be manifestly unjust to allow the fraudulent mortgagee later to depend upon the natural priority of the mortgage. Neither law nor equity will assist a cheat, and in such a case the fraudulent mortgagee will lose priority to the person who has been deceived. In this way even a legal mortgage can be postponed to a later equitable interest (*Peter v Russel* (1716) 1 Eq Cas Abr 321).

(b) Misrepresentation

Similarly, a mortgagee who enables the mortgagor to make some false representation to a later purchaser will be prevented from claiming a priority which conflicts with the representation made. Thus allowing the mortgagor to recover the deeds (or, before 1926, to retain them) in order to create a later mortgage is regarded as holding the mortgagor out as being able to mortgage the property. In such a case, the second mortgagee will get

priority if he or she did not know of the first mortgage, and thus even an equitable mortgagee may take priority over an earlier legal mortgage.

In *Perry Herrick v Attwood* (1857) 2 De G & J 21, the legal mortgagees left the title deeds in the hands of the mortgagor, so that he could raise a further loan of a prescribed amount, secured by a mortgage which, it was agreed, should take priority over the earlier mortgage. In fact, the mortgagor then created two further mortgages, for a greater amount than was intended, and it was held that in these circumstances the first legal mortgagees lost their priority to both later mortgagees.

(c) Gross negligence

The suggestion that it is possible to lose one's priority due to gross negligence in the protection of one's own interests causes rather more difficulties.

In *Northern Counties of England Fire Insurance Co. v Whipp* (1884) 26 ChD 482 a mortgagee company, which allowed the mortgagor access to a safe in which his deeds were stored, was held not to have lost its priority when the mortgagor recovered the deeds and created a second mortgage. Oddly, the court held the first mortgagee's action to be merely careless, and said that priority could only be lost in a case of gross negligence.

In *Walker v Linom* [1907] 2 Ch 104, a purchaser of the legal estate, who asked for the title deeds but failed to check that all had been delivered to him, was held to take the land subject to a later equitable mortgage. It may be that the purchaser in this case was regarded as having been grossly negligent because he was a solicitor and accordingly should have been aware of the need to check the deeds carefully. A contrary decision was reached in *Cottee v National Provincial Bank of England Ltd* (1904) 20 TLR 607.

However, also see *Hunt v Elmes* (1860) 2 De G F & J 578, where a solicitor mortgaged two properties, A and B, to a client. The client-mortgagee received a parcel bearing a label which stated that the deeds of both properties were enclosed. In fact, the deeds of property B were missing, and the solicitor later sold that property to a third party. In this case the mortgagee was held not to have lost his natural priority because he was entitled to rely on the solicitor mortgagor. It was accepted that the mortgagee had been imprudent, but not so imprudent as to lose his priority.

23.3.2 Equitable mortgages

In the case of an equitable mortgage with deposit of title deeds, the first question to ask is:

What is the nature of the later competing mortgage—legal or equitable?

23.3.2.1 Position where the competing mortgage is legal.

This situation, of an earlier equitable mortgage and a later legal one, would seem likely to turn on a straightforward application of the doctrine of notice. If the purchaser for value of a legal estate has actual or constructive notice of an earlier equitable interest (that is, knows or ought to know of it) the purchaser will be bound by it, whereas if the purchaser does not have that notice he or she will take free of the interest. Here, the later mortgagee is a 'purchaser for value of the legal estate' (*Brace v Duchess of Marlborough* (1728) 2 P Wms 491), and one would expect that the mortgagor's inability to produce the title deeds would give the later mortgagee actual or constructive notice of the earlier equitable mortgage, which is protected by deposit of those deeds.

There are, however, a number of decisions which do not deal with the matter in these terms, but are instead concerned with whether the legal mortgagee has been so *negligent* in investigating title that he should be postponed to the earlier equitable mortgagee. Thus, in *Hudston v Viney* [1921] 1 Ch 98, in which a legal mortgagee did not investigate the mortgagor's title for the full statutory period and therefore failed to discover an earlier equitable mortgage, Eve J said that something more than mere carelessness was necessary to make the legal purchaser subject to the equitable interest:

[I]t must at least be carelessness of so aggravated a nature as to amount to the neglect of precautions which the ordinarily reasonable man would have observed and to indicate an attitude of mental indifference to obvious risks.

Several cases in which the decision is based on negligence rather than notice are concerned with the situation in which the legal purchaser has asked for the title deeds and has been given some excuse by the owner for their non-production.

In *Oliver v Hinton* [1899] 2 Ch 264, a purchaser who accepted the excuse that the deeds related also to other property was held to be guilty of gross negligence, and postponed to an earlier mortgagee, Lindley MR specifically saying: 'I do not base my judgment upon constructive notice of the charge' (at p. 273).

In *Hewitt v Loosemore* (1851) 9 Hare 449, however, a mortgagee who accepted the rather weak excuse that the mortgagor was busy and would produce the deeds at a more convenient time, was allowed to take free of an earlier equitable mortgage; the court saying that a legal mortgagee was not to be postponed to an earlier equitable one 'unless there be fraud or gross or wilful negligence on his part' (at p. 590). This decision may, however, have been affected by the fact that the mortgagor was a solicitor, whilst the mortgagee was a farmer and the mortgagor's cousin.

A later acquirer was also protected in *Agra Bank Ltd v Barry* (1874) LR 7 HL 135, when he accepted the excuse that the deeds were in Ireland, which, since the land was in Ireland, may well have appeared reasonable, at least in the context of gross negligence. One cannot help but feel, though, that these excuses should have put the legal mortgagees on their guard and they might well have been deemed to have had constructive notice, had the courts been employing the doctrine of notice rather than the concept of negligence.

It was for this reason that I mentioned earlier, when comparing the position of legal and equitable mortgagees, that the equitable mortgagee might also find himself at a disadvantage on questions of priority. In the days before 1926, when these cases were decided, there was nothing more that equitable mortgagees could do to protect themselves. Today, however, they might perhaps be better advised not to take the title deeds, for without them they have a registrable land charge, registration of which gives actual notice to all later purchasers.

23.3.2.1 Position where the competing mortgage is equitable.

Here there will be two competing equitable mortgages, and accordingly the principle we have already mentioned will apply: where the equities are equal, the first in time prevails. Thus, equitable mortgages rank for

priority in chronological order, unless the earlier mortgagee loses his priority through fraud, misrepresentation or negligence in failing to retain the title deeds. The general principles involved are very similar to those discussed in connection with the postponement of a legal mortgage, although there have been suggestions that an equitable mortgagee will be postponed by a lesser degree of negligence than is needed in the case of a legal mortgagee. However, we know of no decision in which an equitable mortgagee has been postponed for anything less than gross negligence, and in *Taylor v Russell* [1891] 1 Ch 8 the court expressed the view that the same standard should apply to both.

The rules relating to mortgages of unregistered land are shown in schematic form in **Figure 23.3** in the text of the book.