

Chapter 26

Question 1: Is it satisfactory that the lender has an immediate right to possession or do the existing qualifications to this right provide adequate safeguards?

The lender's right to possession and qualifications to that right are considered in section 26.2. These qualifications relate almost exclusively to domestic premises and do effectively curtail the lender's immediate right to take possession of occupied domestic premises other than by court order which then in turn engages the protection afforded by the pre-action protocol upon possession actions for mortgage arrears and section 36 of the Administration of Justice Act 1970 (as amended). These qualifications reflect the view promoted by MCOB 13 that possession should be considered a right of last resort which should not be exercised until all attempts to help the borrower clear the arrears have been considered. Although it should be noted that a breach of MCOB will not affect the lender's immediate right to possession see *Thakker v Northern Rock Plc*.

A particular gap in borrower protection arises where the lender does not seek any order for possession either because the premises are not presently occupied by the borrower or the borrower voluntarily gives up possession to the lender. The latter situation is not uncommon and may reflect a borrower's feeling of hopelessness in the face of their financial troubles. Examples of the former situation are *Ropaigealach v Barclays Bank plc*, where the borrowers were temporarily absent from the property which was undergoing renovation, and *Horsham Properties Group Ltd v Clark*, where the property was let out by the borrower. The worrying aspect of these two cases is that the lender was able to sell the properties concerned without the borrower being informed or aware of the sale and thus had no opportunity to question the lender's right or try and repay the arrears. It sparked such concern that The Ministry of Justice consulted on the issue however no legislative change has been forthcoming perhaps because the Council of Mortgage Lenders have issued guidance to their members that possession should be obtained by court order.

This procedural lacuna may well engage Protocol 1 Article 1 and/or Article 8 of the ECHR. Although it is beyond doubt that the lender's ability to take possession in order to realise their security is a legitimate aim which in the normal course will be proportionate in striking a fair balance between the lender and borrower, the lack of procedural safeguards to enable an independent tribunal to assess that proportionality could raise serious compatibility questions should the HRA 1998 be applied horizontally – see sections 26.2.6 and 26.3.1.4.

Question 2: Compare the different approaches to the width of the courts' discretion under section 36 of the Administration of Justice Act 1936 that were taken in *Cheltenham & Gloucester Building Society v Norgan* and *Bristol & West Building Society v Ellis*. Do you think the court's approach in both cases is consistent?

The important jurisdiction of the court to adjourn possession proceedings or stay or postpone the execution of a possession order of a dwellinghouse under section 36 of the Administration of Justice Act 1970 (as amended) is considered in section 26.2.5. The court may exercise this jurisdiction where it is of the opinion that the borrower is able to pay any sums due under the mortgage within a reasonable period. The decisions in *Norgan* and *Ellis* demonstrate the court's different approaches where the sums due under the mortgage are to be repaid from the borrower's income and other resources (*Norgan*) or from the proceeds of sale of the borrower's mortgaged dwellinghouse (*Ellis*). In the former the court will look to see whether the borrower is able to meet their repayment obligations under mortgage by the expiry of the mortgage term even though the borrower may be in temporary financial difficulties. In these circumstances the court will also need to be satisfied that the lender's position is adequately secured against the mortgaged property in the interim. By contrast, where the borrower proposes to meet their financial commitments to the lender from the sale proceeds of the mortgaged property, the court will only postpone possession for a short period in order to let the borrower complete the sale and redeem the mortgage in full. There must thus be a real prospect of sale. In essence the choice here is whether the sale of the property should be conducted by the borrower or the lender, the pros and cons of which were considered by the court in *Cheltenham & Gloucester Building Society v Bookers*.

Question 3: Why would a borrower wish to apply to court for an order for sale under section 91 LPA 1925? When is a court likely to be sympathetic to such an application?

The court's jurisdiction to order sale under section 91 of the LPA 1925 is considered in section 26.2.5.5. A borrower might wish to pursue an order for sale under this section where they wish to take the initiative to bring about the sale of the mortgaged property when a lender is seeking possession. Traditionally the court would be reluctant to make such an order unless the value of the property exceeded the amount due under the mortgage; there was then no real risk of prejudice to the lender's position by allowing the buyer to bring about the sale. However where the borrower was in negative equity, a sale would leave part of the sums due to the lender unsecured. Nevertheless, in *Palk v Mortgage Services Funding Ltd* the court was persuaded to order sale even though the borrower was in negative equity. The circumstances were somewhat unusual because the lender was seeking possession with a view to renting the property rather than to exercise their power of sale. The market was in a depressed state and the lender wished to wait until the market recovered before selling in the hope that they would then be able to achieve a price that would clear the mortgage debt. However, it is clear that the court will still be cautious in ordering sale at the instigation of the borrower where there is negative equity, particularly where the lender is seeking to exercise its right to possession with a view to sale. In such circumstances the court is unlikely to interfere with the lender's power to take control of the conduct of the sale – see *Cheltenham & Gloucester Building Society v Krausz*.

Question 4: A lender's duties in exercise of his power of sale arises in equity rather than in tort but what consequences flow as a result?

The lender's duty to take reasonable care to obtain a proper price for the property should he or she exercise their power of sale seems to echo the tort of negligence which calls for the exercise of reasonable care to avoid damage to persons who may foreseeably suffer loss. But the lender's duty arises in equity and is based upon the lender:borrower relationship which confers upon the lender a power to sell the mortgaged property in the event of default. The breach of this duty will render the lender liable to account not just for what he or she receives but for what they ought to have received if they had acted in accordance with the duty placed upon them. We consider the nature of the lender's duties in section 26.3.2 and the equitable origins of this duty in section 26.3.2.1.

The most significant distinction flowing from the equitable source of the lender's duties are in determining to whom the duty is owed and the measure of damages. The limited scope of the lender's duty is illustrated by the case of *Parker-Tweedale v Dunbar Bank plc* in which a beneficial co-owner was unable to directly claim against the lender when the lender's duties were owed solely to the trustees of the legal estate. The beneficial co-owner's right of action is against their trustee. The level of damages may also differ. For instance, the lender may be called upon to account for the price of the property he would have obtained if he had taken reasonable care rather than the foreseeable loss the borrower has suffered. These differences are examined in sections 26.3.2.2 and 26.3.2.6.

Question 5: In exercise of his power of sale, a lender has a duty to obtain a proper market price. What does this mean and what would you advise a lender to do in order to fulfil this duty?

The lender's duty to obtain a proper market price does not mean that the lender has to obtain a price which reflects a hypothetical valuation of what the property would sell for on the open market. Rather, the duty focuses upon what steps the lender has taken to market the property to try and ensure that the property has been properly exposed to the market and thus a proper market value achieved. We explore the nature of this duty in section 26.3.2, particularly in sections 26.3.2.4-26.3.2.5. The cases that are reviewed in these sections demonstrate that the court is concerned to see that the lender has taken the advice of experts to ensure that the property is properly marketed. Proper advertisement and mode of sale are particularly important. The lender however may choose the time of sale and is not obliged to take steps to enhance the value of the property.

Question 6: In what circumstances could a borrower successfully apply to set aside a sale made by a lender?

A breach of the lender's duty to obtain a proper market price for the property will generally result in monetary redress flowing from his or her duty to account for what ought to have been received. The lender is also under a duty to demonstrate that he or she has exercised their power of sale in good faith – see section 26.3.2.5. A failure to do so opens up the possibility that the court may exercise its discretion to set the dubious sale aside. Of course the position of the purchaser will also need to be considered by the court in the exercise of their discretion to set aside an improper sale. Statute does provide some protection to a purchaser but the level of that protection differs depending upon whether the land is unregistered or registered. Section 52 LRA 2002 will protect a purchaser, unless a restriction alerts the purchaser to some limitation of the lender's power of sale, whilst s 104 LPA 1925 is the operative provision governing unregistered land, where protection is limited to purchasers who have no knowledge of the impropriety. These issues are explored in more detail in section 26.3.2.6.

Question 7: Contrast the duties expected of a lender and a receiver that they may appoint.

Loi in his article extracted in section 26.4.3 points out that a lender, in protecting their own interests in exercise of their power of sale, is not liable to the borrower on the basis of nonfeasance but only for misfeasance if they choose to exercise their power. Thus a lender is free to choose the time of sale but when they make that decision they must demonstrate good faith and the required standards of care. A receiver by contrast is managing the mortgaged property and as such is required to act. The difference is illustrated by the case of *Medforth v Blake*. Receivers owe a duty to their principal, the borrower, but an overriding duty to the lender to exercise their powers to recover the mortgage debt and pursuant to whose interests they are appointed. This overriding duty impacts upon the nature of their duties to the borrower and thus for instance provides some latitude in when they can decide to act.