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Discharge of Mortgages

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16. Examinations under the Corporations Act and ASIC Act *5 March 2012*†

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A. Discharge of Torrens mortgages

1. Section 65(1)

Section 65(1) of the Real Property Act (RPA) provides:

> Whenever a mortgage, charge or covenant charge registered under this Act is intended to be discharged wholly or partially the mortgagee, chargee or covenant chargee shall execute a discharge in the approved form.

The procedural step by which a registered mortgage is removed from the register is the lodgement of a discharge in the approved form. The discharge must be accompanied by the original certificate of title. Thus a second mortgage may be paid out by the mortgagor but the discharge received on settlement cannot be registered until the first mortgagee produces the Certificate of Title. If the mortgagor is entitled to a discharge, a registered mortgagee must execute a discharge in the approved form.

2. Section 65(2)

RPA s 65(2) provides:

> Upon registration of a discharge of mortgage, charge or covenant charge the mortgaged or charged estate or interest shall, to the extent specified in the discharge, cease to be charged with any moneys secured by the mortgage, charge or covenant charge.

This subsection is the counterpart to subsection (1). It provides that if a discharge or a mortgage (or other similar charge) is registered then the mortgage (or similar charge) ceases to burden the security land to the extent specified in the discharge.

It is important to consider this section when a first mortgagee is asked to lift a mortgage to allow another mortgagee to become first mortgagee, as this exposes the incumbent to a loss of priority. The safer approach is for the new first mortgage to be submitted for registration together with a *Postponement of Mortgage* form pursuant to s56A RPA.

3. Release of personal covenants

The High Court in *Groongal Pastoral Co Ltd (in liq) v Falkiner* (1924) 35 CLR 157 dealt with the question of whether a particular discharge of mortgage prepared and registered in accordance with RPA s 65 had operated to extinguish the mortgagor's personal covenant.

The Court (in a joint judgement) determined that s 65 merely operated to free the land specified in the discharge from the mortgage, and that even if the mortgage was extinguished by this means over all of the land formerly subject to it, that alone would not extinguish also the personal covenant of the mortgagor. The Court found, however, that because the discharge was a dealing registered under the RPA, the discharge operated as a Deed (this is the effect of RPA s 36(11)). The discharge had been drafted so as to expressly provide for the release of the mortgagor's personal covenant, and in the circumstances the release was effective. The Court noted, (at p 165) that "A discharge differently worded would not necessarily have that effect". In other words, a discharge that does not either expressly or impliedly release the personal covenant will not have the effect of releasing the personal covenant.

It follows from *Groongal Pastoral* that when releasing a security property (so it can be sold or refinanced) in circumstances where the personal covenants are to be retained, item (G) on the standard discharge form should read:

> The mortgagee discharges the above mortgage so far as it affects the land but not the personal covenants.

4. Redemption where the mortgagee is missing

In the event of an unlocatable mortgagee, s 98 of the Conveyancing Act operates to provide a mechanism for redemption by the mortgagor. Section 98 (1) states:

> Where land is subject to a mortgage and the person empowered to … to execute … a discharge … is out of the jurisdiction, cannot be found or is unknown, or if it is uncertain who that person is, the court may, upon the application of the person … entitled to redeem the mortgaged land, determine in such manner as the court thinks fit whether or not all amounts due under the mortgage have been paid and, if not, the amount thereof outstanding.

After making that determination, if the mortgagor pays into court all the monies the court finds are owing under the mortgage, the court will issue a certificate of compliance under subsection (1F), and then the mortgagor may produce that certificate to the Registrar-General under subsection (4A) and then cause the Registrar-General to amend the register to remove the notation recording the mortgage.

B. Disputes concerning payout figures

1. Notice of intention to discharge

The amount of notice required to be given by a mortgagor to a mortgagee to redeem a mortgage depends on circumstances. Normally, the mortgagor need merely give reasonable notice to enable the mortgagee to perform the necessary administrative steps to effect a discharge. For example, Parker J in *Webb v Crosse* [1912] 1 Ch 323 at 328 stated the following:

> But when such a tender is made conditional on the execution of a conveyance, it is, I think, necessary that a reasonable time shall be allowed to obtain the execution of the conveyance, especially when the conveying parties are not the parties to whom the tender is made. In *Wiltshire v Smith* (3 Atk 89) Lord Harwicke held a tender to be bad in equity for the purpose of stopping interest because the mortgagee was not allowed a reasonable time to peruse the conveyance which was made a condition of payment.

Young J in *Challenge Bank Ltd v Hodgekiss* (1995) 7 BPR 14,399 @ 14,402 cited *Webb v Crosse* with approval, noting:

If a tender is conditionally upon documents being accepted, the mortgagee is to have a reasonable time to consider the documentation before accepting or rejecting the tender.

2. Entitlement to accounts

The mortgagor has a right to a payout figure. If there is a dispute as to the payout figure, the mortgagor has the right to obtain an account from the mortgagee as to the amount owing under the mortgage. This right can be enforced through redemption proceedings commenced by the mortgagor, which involve the taking of such accounts if the payout figure is in dispute. The mortgagee normally receives its costs of taking accounts, but can be refused such costs if the court considers, in the light of the account-taking, that the mortgagee has acted unreasonably. See *Project Research Pty Ltd v Permanent Trustee of Australia Ltd*[1] for the general principles concerning the rights to accounts and the costs thereof.

Fisher & Lightwood's Law of Mortgage[2] states that "the mortgagor has the right to know how the redemption figure is arrived at: see *Cityland and Property (Holdings) Ltd v Dabrah* [1968] Ch 166 at 172-3". The relevant section in *Cityland*, however, refers to a situation where a mortgagor is unable to redeem because he has not been informed of the sum required on redemption due to the refusal of the mortgagee to calculate the effect of a particular provision of the mortgage on the amount owing. *Cityland* would thus seem to be authority only for the proposition that the mortgagee needs to tell the mortgagor the amount that needs to be paid to redeem.

That said the failure of mortgagee to provide a breakdown showing how the payout figure is arrived at might well be seen as unreasonable conduct of a mortgagee if the breakdown could be fairly easily provided by the mortgagee, whilst failing to provide the figure might then necessitate expensive redemption proceedings for the mortgagor to verify that the payout figure was correct.

3. Redemption suits

A redemption suit is brought by a person wishing to redeem a mortgage (usually the mortgagor) to compel the mortgagee to accept the monies properly due under the mortgage and to discharge to mortgage. If there is a dispute as to how much is outstanding under the mortgage, such a suit will also necessarily involve the taking of accounts so that the outstanding balance can be determined by the court.

4. Retention of monies for security for costs

Project Research Pty Ltd v Permanent Trustee of Australia Ltd[3] is a NSW Supreme Court decision by Hodgson J. In that case, a group of companies called "the Vago Group" borrowed a sum of money from Permanent Trustee ('the mortgagee") which took by way of security mortgages over a large number of properties owned by various companies in the group. After default occurred, the mortgagee took possession of 40 security properties, sold those properties, and with the sale proceeds paid out the entirety of the debt, including the mortgagee's legal costs of all the

[1] (1990) 5 BPR 11,225
[2] Second Australian Edition at 32.39
[3] (1990) 5 BPR 11,225

possession proceedings. However there were still some security properties unsold, and Project Research ("the mortgagor"), being one of the Vago Group companies, was the owner and mortgagor of one such property ("the land").

The mortgagor requested the mortgagee return its title documents and provide a discharge of mortgage. The mortgagee refused, saying that it needed to retain its mortgage over the land as security for the anticipated costs of taking accounts between the Vago Group and the mortgagee. A requirement for accounts was anticipated by the mortgagee in the circumstance that there were already proceedings by the Vago Group against the mortgagee's solicitors seeking a taxation of the solicitors costs, and the mortgagee believed that if the Vago Group failed in those proceedings the next step would be a suit for accounts. The mortgagee led evidence estimating $20,000 as the estimated costs of any account proceedings. The mortgagor submitted that no more than $4,500 in costs could be reasonably be expected as costs in such an accounts suit.

Pending hearing of the dispute the mortgagor needed the land to complete a contract for sale, and the mortgagee then agreed to give a discharge of the mortgage and return the title documents to the mortgagor provided that the proceeds of the sale were instead paid to the mortgagee as a substitute security. The mortgagor accepted this proposal, and the proceeds of sale were paid to the mortgagee.

His Honour found that a mortgagee has "an absolute right" to its costs under a mortgage taken out of the security unless they are forfeited by misconduct, and that this right "should not be lost merely because a mortgagor is prepared to pay under protest the amount claimed by the mortgagee, so that the legal contest between them takes place not in redemption proceedings, but in proceedings to recover an alleged overpayment… [The mortgagee] should be entitled to have those costs out of the security, or else out of some alternative security which is provided for the purpose" (p 11,229).

In the circumstances, his Honour concluded:

> if a mortgagee bona fide and on reasonable grounds states a payout figure, which a mortgagor proposes to pay under protest, it is open to the mortgagee to require the payment, in addition to that figure, of a reasonable sum to cover anticipated costs of the proceedings in which the matter will be contested. (p 11,230)

Although his Honour found that the amount of $20,000 "was a generous estimate" for the mortgagee's costs, his Honour noted that it may be reasonable for a mortgagee to receive "a very generous estimate of its anticipated costs", and that if an amount "of well in excess of $20,000" had been sought by the mortgagee and supported by some evidence of the basis for that estimate, he might well have awarded that much greater figure instead. His Honour coined a doctrine in this regard which he called (in tribute to the author of a well-known book of popular philosophy who had set out a similar principal in his book *Godel, Escher, Bach*) "Hofstadter's Law (costs version)", being that "It always costs more than you expect, even taking into account Hofstadter's Law (costs version)."

The result of the case was thus that the mortgagee was entitled to retain the sum of $20,000 from the proceeds of sale of the land as security for the anticipated costs of the anticipated account proceedings, but was ordered to pay the remainder of the proceeds of sale to the mortgagor.

5. Mortgagee's liability for failure to provide a payout figure and discharge

In *Nadrak Pty Ltd v Permanent Custodians* (1994) 6 BPR 13,344, Bryson J had before him a redemption suit brought by a mortgagor. The mortgagor sought a declaration as to the amount of money owing under the mortgage, and an order that the mortgagee discharge the mortgage upon payment of that amount.

The mortgagee took an attitude of maximum unhelpfulness, as it not only refused to provide the mortgagor with any proper accounts as to what was owing, but also refrained from putting on any evidence as to such accounts. The mortgagee, having been roundly condemned by his Honour on an earlier occasion for taking this attitude, belatedly tendered a rough account, but in a form the judge found difficult to comprehend and unverified by any affidavit.

Having conducted the litigation in the above fashion, the mortgagee found itself at a considerable disadvantage at the hearing, as almost all of the evidence as to the balance owing was being tendered by the mortgagor. Amongst this evidence was a facsimile from the mortgagee's mortgage manager noting that four penalty interest payments had been "waived", and thus the mortgagor claimed waiver of these amounts. The mortgagee responded by relying upon a "non-waiver" clause in the mortgage that stated that the mortgagee will not be deemed to have waived its rights except in writing and signed by the mortgagee, and said that the facsimile in question did not meet this description. His Honour found, however, that the non-waiver clause established that waivers were indeed possible, and the facsimile was an admission that such a waiver had in fact been given. In the circumstances that there was no evidence from the mortgagee establishing otherwise or explaining the facsimile, his Honour found that a waiver of these interest payments had indeed occurred. His Honour found further that it was impossible in any event for parties to alter the general law of waiver merely by contractual provision. Additionally, the mortgagee was found to be estopped from claiming the interest as it had informed the mortgagor that the interest was not owing and the mortgagor had relied on that fact by not claiming a tax deduction for that interest, in circumstances where the deduction could no longer be claimed and thus the mortgagor would suffer a detriment if the mortgagee was permitted to go back on its representation.

The mortgagor claimed that the existence of a default rate of interest was a penalty, and hence void. His Honour, however, noted, however, the longstanding rule that allowed for dual interest rates "if expressed in a particular form of words". His Honour was no doubt referring to the permissible formula of having the lower rate expressed as a concession to the standard higher rate in the event of prompt payment, rather than the higher rate being expressed as a penalty in the event of late payment. His Honour cited *David Securities Pty Ltd v Commonwealth Bank of Australia*[4] as demonstrating the continued validity of this principle. As a result his Honour found in

[4] (1990) 23 FCR 1 at 28-31

favour of some but not all of the mortgagor's contentions as to what was owing under the mortgage, and ordered that the mortgagee allow a credit to the mortgagor in the sum of $69,316.68.

The mortgagor then sought damages against the mortgagee for its delay in providing a discharge, in the circumstances that the mortgagee had refused to discharge the mortgage unless it receive a sum of money that was now found to have been considerably in excess of what was owing. However His Honour found at p 13,353, that the mortgagee was not in breach of any term of the mortgage in relation to providing a discharge, saying;

> There is no express covenant to grant a discharge of the mortgage in any circumstances, and in my view there is no necessity for implication of any term into the mortgage, to the effect that any particular time constraints will be observed in granting a discharge or in taking steps preparatory to granting a discharge, such as by responding to a request for discharge and accurately quoting the figure to be paid.

Thus damages could only be sought if there was tortious liability, and in particular a duty of care in negligence owed by the mortgagee to the mortgagor. On this topic, his Honour noted that the relation between mortgagor and mortgagee was already the subject of "a large body of law" but there was no authority supporting the existence of such a liability on mortgagees. His Honour then stated that there were some aspects of the relationship between mortgagee and mortgagor that were suggestive of a duty of care:

> However, the relationship is a much regulated one, contractual but heavily overlain by control exercised by courts of equity, and it would appear to me that there are overwhelming considerations of policy against introducing a duty of care under the common law into this already complex relationship.

His Honour then concluded by finding "there is no basis for the imposition of any damages liability such as is claimed".

C. Tender

1. Basic principles

There are often disputes as to a payout figure or even whether the principal itself is owing. A mortgagor may wish to stop interest from running (particularly if the interest rate is very high) while the disagreement is negotiated or resolved by the court. Simpson CJ in Eq said in *Moore v Lean*[5]:

> In order to stop interest running a tender must be made of the amount due, and the tender must comply with all the legal formalities which the law attaches to the tender. One of these conditions is that the mortgagor must be continuously ready to pay (*uncore prist*): *Gyles v Hall* (2 P. Wms. 378); *Kinnaird v Trollope* (42 Ch. D. 610); 3 *Seton's Decrees*, 6th ed. 1950.

[5] (1905) 5 SR (NSW) 671 at 674

Thus a mortgagor can tender the amount due (even if it is not accepted) and that will stop interest while the mortgagor, for example attempts to have the mortgage set aside under the Contracts Review Act.

2. Consequences of refusing to accept an unconditional tender

As Hogdson J said in *Project Research Pty Ltd v Permanent Trustee of Australia Ltd*[6]:

> … there are various rules or guidelines concerning tender. If a mortgagee refuses an unconditional tender of all that is due under the mortgage, he does so at his peril; he may lose his rights to interest thereafter (but see *Edmondson v Copland* [1911] 2 Ch 301), and he may be liable for the costs of redemption proceedings, if the refusal is considered to be misconduct. However, where a proper tender has been made and refused, the mortgagor does not have a right to proceed for detinue of the deeds to the property; his remedy is a redemption suit, or a summary application for the deeds on terms of substituting for the security a sum equal to the amount secured plus a proper margin: see *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273. In relation to the summary application, the Privy Council in that case at 283 said the practice was to require payment into court of "principal and interest and the probable costs of the suit".

In *Edmondson v Copland*[7], the mortgagor tendered to the mortgagee the amount actually due under the mortgage, but the mortgagee refused to accept it without there being additionally paid 6 months further interest, being an amount that was found to be improperly demanded. The mortgagor then commenced redemption proceedings. By reason of the mortgagee's wrongful refusal of the tender, the mortgagee was ordered to pay the costs of the redemption proceedings. The mortgagor also sought to be excused interest for the period between the date of tender and the date of actual payment. Joyce J refused, however, to relieve the mortgagor from paying interest under the mortgage because the mortgagor did not either pay the originally tendered money into court after the mortgagee's refusal or set it aside by paying it into a bank account ready to discharge the mortgage at any time. Instead the mortgagor used the money in the mortgagor's business. His Honour decided that as the mortgagor had the full use of the tendered funds, it was appropriate for the mortgagor to continue to pay interest to the mortgagee upon those funds.

3. Money must be kept idle

Simpson CJ in Eq held in *Moore v Lean*[8] that in order for a mortgagor to stop interest running by tender, "the mortgagor must be continuously ready to pay". His Honour continues:

> If the mortgagor does not keep the money lying idle, presumably he makes interest on it, and if he keeps that interest, it is only fair that the mortgagee should have his interest. This reasoning does not apply to costs.

[6] (1990) 5 BPR 11,225
[7] [1911] 2 Ch 301
[8] (1905) 5 SR (NSW) 671 at 674

His Honour then concluded that to stop a mortgagee's interest running, a mortgagor must keep the tendered money idle, but the mortgagee will be prevented from claiming costs by its refusal to accept a tender even if the tendered money is not thereafter kept idle. See also *Edmondson v Copland* [1911] 2 Ch 301 (above).

4. Delay in discharge after unconditional tender accepted

As previously noted, in *Nadrak Pty Ltd v Permanent Custodians Ltd*[9] Bryson J determined that there was no duty of care owed by a mortgagee to a mortgagor to provide a prompt discharge, and thus unless the mortgage (or some other contract between mortgagor and mortgagee) provides a contractual obligation to provide a prompt discharge then the mortgagee has no liability to the mortgagor in damages.

Of course, delaying in providing a discharge is inadvisable for a mortgagee regardless of its liability for damages because it is likely that the mortgagor will commence redemption proceedings to compel the grant of a discharge, and the mortgagee would almost inevitably have to bear the entire cost of those proceedings, possibly on an indemnity basis.

5. Tender under protest

In *Greenwood v Sutcliffe*[10], it was held by the English Court of Appeal that a tender under protest, which reserved the mortgagor's right to challenge the mortgagee's costs and to have an account taken, was a good tender, and was not merely a conditional tender which could be ignored by the mortgagee.

This decision is not inconsistent with that of *Project Research Pty Ltd v Permanent Trustee of Australia Ltd*[11]. In *Project Research*, the mortgagee was also obliged to accept a tender under protest by the mortgagee, reserving rights to take an account. In *Project Research*, however, the mortgagee had the good sense to also demand a generous allowance as security for its expected costs of the taking of accounts, which demand was found in that case to be a proper one.

6. Conditional tender

Unlike a tender under protest (which is effective in stopping interest from running) a conditional tender is not effective. A conditional tender is a tender of monies made on condition that the mortgagee or some other person does something in return for the tender. A typical example is a tender on the condition is that the mortgagee accept the amount tendered as full satisfaction of the mortgage debt. In *Brennan v Pitt, Son & Badgery Ltd (No. 2)*[12], Simpson CJ in Eq stated the following:

> As I understand the law, there is a clear distinction between a conditional tender and a tender under protest. Neither party has a right to require the other party to make any admission, but he may guard himself from his own act being taken as an admission by a protest. The tender in this case was in my opinion conditional. Burcher in the first instance tendered the money "in satisfaction of Brennan's mortgage." This Wright refused to accept. In cross-

[9] (1994) 6 BPR 13,344
[10] [1891] 1 Ch 1
[11] (1990) 5 BPR 11,225
[12] (1901) 1 SR (NSW) Eq 92 at 99

> examination the witness Smidmore said, "Burcher then said he would not pay the amount without a receipt in discharge of the amount due under the mortgage." This is equivalent to saying, I only tender the money on condition of your accepting it as the full amount due. The tender was therefore bad.

The above passage has since been cited and followed by Owen J of the Supreme Court of Western Australia in *Kirk Contractors Pty Ltd v Lasnom Pty Ltd*[13].

7. Can tender be made by arranging a refinance?

Generally speaking an actual tender must be made, but Young J notes in *GWH Pty Ltd v Commonwealth Bank of Australia*[14] that:

> The conduct of the mortgagee may in appropriate cases amount to a dispensation with the tender. A mere claim of more than is due will not have this effect, as a general rule, unless the creditor conducts itself in such a way to show that a tender of the amount properly due would not be accepted…

In *Challenge Bank Ltd v Hodgekiss* (1995) 7 BPR 14,399 @ 14,402, Young J noted further:

> To show dispensation from the requirement to tender it must be established by the mortgagor that on the balance of probabilities, had the tender been made, it would have been refused.

As mentioned previously, in order for interest to stop running under a mortgage, even when there has been a proper tender or such tender has been dispensed with, the mortgagor must also set the discharge money aside so that the money is lying idle and is continually ready to be paid to the mortgagee.

D. Date for redemption

1. No date specified for redemption

A mortgage cannot be drafted such as to prevent a mortgagor from redeeming - any attempt to do so will be regarded as a clog on the equity of redemption and be set aside as such.

Fixing no date for the expiry of a mortgage does not make redemption harder for the mortgagor but easier. If a time for redemption is specified in the mortgage then there is no general law right for a mortgagor to redeem prior to that date: *Hyde Management Services Pty Ltd v FAI Insurances Ltd*[15] (but see s 93 of the Conveyancing Act for a statutory right of early redemption). If, however, no time is specified but the debt is repayable on demand by the mortgagee, the mortgagor may redeem at any time: *GA Investments Pty Ltd v Standard Insurance Co Ltd*[16].

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[13] (1995) BC9503644
[14] (1994) 6 BPR 14,073 at 14,088
[15] (1979) 144 CLR 541
[16] [964] WAR 264

2. Statutory entitlement to early redemption

Section 93 of the Conveyancing Act provides as follows:

> (1) A mortgagor is entitled to redeem the mortgaged property although the time appointed for redemption has not arrived; but in such 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: Provided that redemption under this subsection shall not prejudice the right of the mortgagee to any collateral benefit, or to enforce any burden or restriction to the extent to which the mortgagee would be entitled under the mortgage or otherwise if the mortgage were paid off at the due date.

The section provides a statutory right to a mortgagor to redeem the mortgage prior to the expiry of the term of the mortgage, provided the mortgagor pays to the mortgagee upon early redemption all of the interest the mortgagor would have had to pay in the course of the remainder of the term, plus principal, costs and any other monies then owing under the mortgage. This means that the mortgagee can never suffer any loss by the exercise of the mortgagor's rights under s 93 as the mortgagee is receiving all the money the mortgagee would have received had the mortgage continued.

Sub-section (3) precludes contracting out of this right of early redemption, the reverse situation was considered in *Steindlberger v Mistroni*[17], Needham AJ found that s93(3) of the Conveyancing Act did not preclude a mortgagee and mortgagor agreeing on terms more generous to the mortgagor with respect to early redemption than the terms set out in s 93(3). In that case the mortgage provided that the mortgagor could redeem at any time on one month's notice paying interest only up to the date of discharge, and Needham AJ determined that the mortgagor was entitled to rely upon that term and was thus not obliged to pay interest for the unexpired term.

3. 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[18]).

Section 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).

Section 92 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;

[17] (1992) 29 NSWLR 351

[18] [1891] 3 Ch

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”.

4. Subsequent agreement for early redemption

Myross v Kahlefeldt[19] was a New South Wales Supreme Court decision of Barrett J concerning a mortgage subject to the Farm Debt Mediation Act and the amount of interest due on the redemption of that mortgage. The mortgagor and the mortgagee entered into an agreement following a mediation under the Farm Debt Mediation Act. This agreement provided for the mortgagor selling the security by a certain date. This date was earlier than that specified as the redemption date in the mortgage. The mortgagor, pursuant to the agreement, then sold the security by that earlier date. There was then a dispute as to whether interest was payable to the mortgagee for the entire term of the loan or only up to the date of settlement of the sale (which settlement also involved a payment out of the mortgage). Barrett J stated[20] that, in both law and equity:

> Where a loan is made at interest for a fixed term, the borrower has no right to repay principal before the end of the term unless the contract gives that right.

However he then followed *Steindlberger v Mistroni*[21], noting[22] that:

> An alternative right of early redemption created by contract may co-exist with the statutory right… Where the contractual right is, for the mortgagor, more attractive that the statutory right, the latter, clearly enough, will remain in abeyance in a practical sense.

Barrett J identified the central issue as being whether the mortgagee had lost the ability to confine the mortgagor to the statutory right of redemption conferred by s 93(1) of the Conveyancing Act. In this regard *Branwood Park Pastoral Co Pty Ltd v Willing & Sons Pty Ltd*[23] was cited, in which Helsham J identified three circumstances in which such ability will be lost, being:

1. where there is some "express provision in the contract of mortgage";
2. where "the mortgagee himself demands payment"; and
3. where the mortgagee "takes steps to realise his security, by entering into possession or otherwise".

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[19] (2003) 11 BPR 21,015
[20] at 21,016
[21] (1992) 29 NSWLR 351
[22] at 21,017
[23] [1976] 2 NSWLR 149

Barrett J found, however, that such a right could also be lost by way of an implied term in an agreement, and that in the case before him it was an implied term of the agreement arrived at during mediation that if the security was sold by the mortgagor in accordance with that agreement, the mortgagor would be making early repayment and that the defendant would accept the payment and discharge the mortgage for the principal and interest due as at that date.

5. Acceleration clauses

Mortgages commonly provide for the acceleration of principal in the event of default. The mortgagor cannot, however, simply default under the mortgage, state that the principal is now due and owing, and then repay the principal without interest for the unexpired term. This is because such clauses merely provide the right for a mortgagee to demand the repayment of the entirety of the principal at the mortgagee's election upon default (and even this right is constrained by the need in relation to monetary defaults to serve a s 57(2)(b) notice which must then expire before acceleration may take place). If the mortgagee elects to pursue this right and accelerate the principal, then the mortgagee must discharge the mortgage if the principal is proffered with outstanding interest and costs, without a right to receive interest for the unexpired term of the mortgage. If, however, the mortgagee does not elect to accelerate the principal, the mortgagee can continue to require interest for the unexpired term notwithstanding that the mortgagee has the right to demand the principal. In other words, the right to accelerate is the mortgagee's to exercise, not the mortgagors: see *Branwood Park Pastoral Co Pty Ltd v Willing & Sons Pty Ltd* [1976] 2 NSWLR 149.

6. Prepaid interest

As previously discussed, the right to early redemption provided by s93 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*[24]. 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.

[24] [1976] 2 NSWLR 149; (1977) 1 BPR 9534 (CA)

E. Clogs & collateral advantages

1. The rule regarding clogs

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 it is not[25]:

(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 rate of interest due, or a reasonable sum payable in lieu of interest being charged, does not offend the above rule. However if a further premium is specified 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*[26].

2. Collateral advantage rule

The maxim "once a mortgage, always a mortgage" refers to the rule, as stated in *Fairclough v Swan Brewery Company Ltd*[27], 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*[28] had no such compunction and was prepared to do more than merely complain about the illogicality of the rule, determining:

> 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*[29] and by the South Australian Full Court decision of *Epic Feast Ltd v Mawson KLM Holdings Pty Ltd* (1998) 71 SASR 161. Young J's dictum represents a watering down of the law of collateral advantages in that unfairness and

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[25] as provided in *Krelinger v New Patagonia Meat and Cold Storage Company Ltd* [1914] AC 25 at 61
[26] [1968] Ch 166
[27] [1912] AC 256 at 570
[28] (1992) 32 NSWLR 194,
[29] (1994) 35 NSWLR 96

unconscionability now appear to be the only touchstones, rather than only one of three alternative modes of invalidity of a collateral advantage (as *Krelinger* states).

3. Contingent liabilities

A mortgage cannot be redeemed if it secures contingent liabilities which are undischarged, because the entitlement to redemption does not arise until the mortgagor tenders a discharge of all liabilities secured by the mortgage.

The most typical example of this situation is when a mortgage secures a guarantee of a loan, in which case (unless the terms of the mortgage state otherwise) the mortgagor is not entitled to a discharge so long as there is a possibility that a liability may come into existence under the guarantee (such as by the borrower defaulting under the loan).

4. Bonus upon sale

A stipulation that the mortgagee shall receive a bonus or commission if the property is sold will almost inevitably fall foul of the collateral advantage rule (which rule is best set out in *Krelinger v New Patagonia Meat and Cold Storage Company Ltd*[30]) as the demand of additional monies unfairly hampers the mortgagor's ability to redeem the mortgage: see *Broad v Selfe*[31]; *Browne v Ryan*[32].

5. Charging high interest rates instead fees

Because of the prohibitions against collateral advantages, it is good drafting practice not to make reference to any premiums or bonuses payable on discharge in a mortgage. A better way to achieve the desired effect is to merely charge a rate of interest sufficient to remunerate the mortgagee to a similar extent as if such premiums or bonuses were charged (and have that component of the interest payable upon discharge.

As established by Young CJ in Eq's decision in *Takemura v National Australia Bank*[33] (which was followed by Wood CJ in CL in *Guardian Mortgages v Miller*[34] and by Hulme J in *Brendan King Pty Ltd v Toseska*[35]), no interest rate, however high, is unconscionable per se, although, of course, a high interest rate may give rise to unconscionability when coupled with other facts.

F. Parties entitled to redeem

1. Redemption by a part owner

A co-owner of Old System land has the ability to redeem the mortgage over the entirety of the land, but does so subject to the equities of the other part owners: *Hall v Heward*[36]. This means that the co-owner can redeem the mortgage and obtain a conveyance of the legal estate in the security, but does not thereby become owner in

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[30] [1914] AC 25
[31] (1863) 11 WR 1036
[32] [1901] 2 IR 653
[33] [2003] NSWSC 339
[34] [2004] NSWSC 1236
[35] [2006] NSWSC 487
[36] (1886) 32 Ch D 456

equity of the entire estate, as the other co-owners retain their rights in equity to their aliquot shares in the land.

In the case of Torrens Title land, redemption does not involve the transfer of the legal title of land, but rather the discharge or assignment of the mortgage. Following *Hall v Heward*, a co-owner of Torrens land has the right to redeem a mortgage, but would not then become registered proprietor of the whole legal estate, as that is not how redemption occurs with respect to such land. The co-owner would pay out the mortgage debt and in return could then choose between the mortgagee registering a discharge of the mortgage, and the mortgagee transferring the mortgage to an incoming third party financier pursuant to s 94 of the Conveyancing Act. In either case, the other co-owner's rights are not diminished - they either benefit from the discharge of the mortgage or, if not, they are in a no worse position as the same mortgage is registered on title but that mortgage has been transferred to a new mortgagee.

Unless there is a term in the mortgage or other similar contract between the mortgagee and the mortgagors to the contrary, the mortgagee is free to hand over the certificate of title to the security to a redeeming co-owner without being in breach of any contractual duty. That is because there is no express term prohibiting that act, and no term would be implied to prohibit release in so far as the co-owner has, at common law, a right to redeem and that right in includes the right to receive title documents (title deeds under Old System, certificates of title under the Torrens System).

2. Redemption by a subsequent mortgagee

Section 94 of the *Conveyancing Act* sets out the obligations on a mortgagee to transfer the mortgage to any third person as "the "mortgagor" directs. "Mortgagor" in that Act is defined to include any person "deriving title to the equity of redemption under the original mortgagor, or entitled to redeem a mortgage". Section 95 refers back to the right of the "mortgagor" in s 94, and reads as follows:

> The right of the mortgagor under the last preceding section shall belong to and be capable of being enforced by each incumbrancee or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancee shall prevail over a requisition of the mortgagor, and as between incumbrancees a requisition of a prior incumbrancee shall prevail over a requisition of a subsequent incumbrancee.

Section 95 clearly presupposes that incumbrancees (ie mortgagees) may share the right of the mortgagor under s 94, and therefore that those mortgagees are persons entitled to redeem the mortgage. This indeed is the reasoning adopted by Kearney J in *First Chicago Australia Ltd v Loyebe Pty Ltd*[37] in finding that a second or subsequent mortgagee was a person capable of redeeming the first mortgage. See also *Bowen v Redmond*[38], which arrives at a similar conclusion under New Zealand Law.

[37] [1980] 2 NSWLR 703
[38] [1926] NZLR 644

This result is indeed in accordance with the situation under Old System Title in which any mortgage after the first was a mortgage of the equity of redemption and thereby granted the subsequent mortgagee the right to redeem.

3. Discharge by the trustee in bankruptcy

Section 136 of the Bankruptcy Act provides:

> (1) Where any property of the bankrupt is subject to a mortgage, the trustee may, upon giving 6 months' notice in writing to the mortgagee of his or her intention to do so or upon paying 6 months' interest in lieu of notice, require the mortgagee to discharge the mortgage notwithstanding that the due time for payment of the moneys owing under the mortgage has not arrived and, upon tender of the moneys secured by the mortgage and, if appropriate, interest in lieu of notice, the mortgagee is bound to execute such documents as are necessary in consequence of the payment.
>
> (2) The rights conferred on the trustee by subsection (1) are in addition to any rights to pay off the whole or part of the moneys secured by the mortgage before the due time conferred on the mortgagor by the mortgage instrument or by a law of a State or Territory of the Commonwealth.

This section gives a trustee in bankruptcy of a mortgagor greater rights than the mortgagor himself possesses. A mortgagor can choose to redeem either in accordance with the contractual terms of the mortgage or in accordance with section 93 of the Conveyancing Act. Section 93 allows the mortgage to be redeemed at any time by paying interest for the remainder of the term. The trustee, however, has the additional option of redeeming under s 136 of the Bankruptcy Act. This right of redemption is more attractive than the right under s 93 if the mortgage has more than 6 months to run at the time of redemption because the trustee can then tender under s 136 interest for 6 months only rather than for the full unexpired portion of the term.

4. When a mortgagor dies intestate

If a mortgagor dies intestate, this will usually pose no difficulty for the mortgagee, as generally speaking in estates with substantial assets (such as land) the deceased's spouse and/or next of kin (who are entitled to take the estate on intestacy) will apply for letters of administration and by this means an administrator of the estate will be appointed to act on its behalf for all purposes. The mortgagee may, however, experience a delay, as often letters of administration are not sought until several months after the date of death, and then take a short further time to issue.

If there is no beneficiary on intestacy who applies to obtain letters of administration but the mortgagee wishes there to be a person empowered to act on behalf of the estate, the mortgagee can apply for the appointment of the spouse and/or next of kin as administrator, provided the mortgagee can find such a person willing to act in that capacity.

If neither the spouse nor next of kin are willing (or, perhaps, do not exist), s 63 of the Wills Probate and Administration Act empowers the Court to appoint "any person, whether a creditor or not of the deceased, that the Court sees fit", which can be done after citations are issued to all people with a superior right to a grant (such as the spouse and next of kin). As the mortgagee will have no interest in the general administration of the estate but only in having a person who can undertake certain discrete tasks (such as paying out the mortgage and receiving a discharge), the mortgagee would normally seek a limited grant only of letters of administration, so as to appoint an administrator *ad litem* empowered only to perform those acts specified in the grant. An administer *ad litem* can also be appointed for the purpose of having a defendant to sue if the mortgagee wishes to commence mortgage enforcement proceedings. UCPR Rule 7.10 gives the court power to appoint a representative for a deceased estate in proceedings concerning that estate when there is no administrator, although usually that appointment would be by way of constituting the representative as an administrator *ad litem*.

In most cases a mortgagee wishing to enforce a mortgage will not need an administrator appointed. If possession proceedings are desired, the mortgagee is not compelled to sue the mortgagor's estate, but can instead sue the actual occupiers of the security for possession and obtain a writ by that means. If there are surplus proceeds of sale of a security but no administrator to receive them, the mortgagee can simply pay the money into court. An administrator of some sort will be required, however, if the mortgagee seeks the payment of money out of the estate, whether by way of the personal covenant to repay.

5. If the mortgagor is a defunct company

If the mortgagor is a deregistered company, s 601AD(2) of the Corporations Act vests all the company's property in ASIC. Section 601AE(3) provides that the vesting of that property is subject to all liabilities including charges. Section 601AF gives ASIC the power to take any act on behalf of the company that a liquidator would be bound to do if one existed.

Thus a mortgagee seeking possession of land from a deregistered company can name ASIC as the defendant. Any surplus proceeds of sale can be paid to ASIC, and if ASIC refuses to provide a discharge of the mortgagees payment obligations the mortgagee can instead pay the surplus proceeds into court. If the mortgagee requires any other act to be done on behalf of the mortgagor concerning the mortgage, the mortgagee can seek that ASIC perform such an act, but just because ASIC may have power to perform an act does not necessarily mean that it will actually act, and it may require the payment of a fee merely to consider the request.

If the mortgagee wishes to sue the mortgagor company to obtain money, it will need to apply to reinstate the company. Such applications are made under s 601AH of the Corporations Act. ASIC has the power to, and will, reinstate a company in certain situations, so an application to ASIC is the mortgagee's first port of call. If ASIC declines to reinstate on the grounds it lacks power in the circumstances of the particular case, it will nonetheless usually consent to the Supreme Court reinstating the company, and so the mortgagee can make an application to the Supreme Court for reinstatement. It should be noted that a Supreme Court reinstatement, although relatively straightforward, can attract a significant cost, and should not be undertaken unless the mortgagee has no other way of recovering its money.

A reinstatement of a deregistered company has the effect under s 601AH(5) of not only re-registering the company, but deeming it never to have ceased existence, although the Supreme Court can make additional orders to deal with matters that have occurred during deregistration, such as, for example, validating possession proceedings taken against ASIC rather than the company itself.

6. Redemption by the Protective Services Commissioner

Section 24 of the Protected Estates Act commences as follows:

> 1) In respect of the estate of a protected person or protected missing person the management of which is committed to the Protective Commissioner, the Protective Commissioner shall have, and may exercise:
>
>   a) all functions necessary and incidental to its management and care, and
>
>   b) such other functions as the Court may direct or authorise the Protective Commissioner to have or exercise.
>
> 2) Without limiting the generality of subsection (1) but subject to subsection (3), the Protective Commissioner shall have, and may exercise, the following functions in respect of the estate of a protected person or protected missing person the management of which is committed to the Protective Commissioner, that is to say, the Protective Commissioner may:
>
>   a) receive money, rent, income and profit of real and personal property,
>
>   f) sell, realise, charge and mortgage real and personal property,
>
>   g) settle, adjust and compromise a demand made by or against the estate,
>
>   k) complete a contract for the performance of which the protected person or protected missing person is liable or enter into an agreement terminating the liability,

Thus when the Protective Commissioner has been appointed to manage the affairs of a person's estate, the Protective Commissioner has the power to do anything required with respect to that management, including mortgaging property, receiving money, compromising claims, entering into contracts, and discharging contracts. The protective Commissioner thus has the power to discharge a mortgage.

G. Transfer instead of discharging

1. Obligation to transfer instead of discharging

Section 94 of the Conveyancing Act provides as follows:

> 1) Where a mortgagor is entitled to redeem the mortgagor shall by virtue of this Act have power to require the mortgagee instead of discharging, and on the terms on which the mortgagee would be bound to discharge, to transfer the mortgage to any third person as the mortgagor directs; and the mortgagee shall by virtue of this Act be bound to transfer accordingly.
>
> 2) This section does not apply in the case of a mortgagee being or having been in possession.
>
> 3) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.
>
> 4) This section applies to mortgages under the Real Property Act 1900 .

The section allows the mortgagor, in cases in which the mortgagee has not yet taken possession of the security property, to pay out the mortgage and, instead of having the mortgage discharged, require the mortgagee to transfer the mortgage to a third party. This section has been construed, however, as not permitting the mortgagor to require a transfer to any third party at all, but only to another lender who has provided money to pay out the existing mortgage and who is not the alter ego of the mortgagor: see *Ley v Scarff*[39].

In *Ley v Scarff*, Barwick CJ (with whom the other judges agreed) construed sections 93 and 94 of the Conveyancing Act. In that case, a registered proprietor of land, after twice mortgaging her property, transferred her remaining interest in the land to her husband. The husband then sought to pay out the first mortgage and take a transfer of that mortgage, but the first mortgagee was unwilling to comply. The husband then relied on s 94 of the Conveyancing Act. His Honour found that the purpose of that section was to facilitate the refinancing of first mortgages, enabling the refinancing mortgagee to retain the same priority as the original first mortgagee without the need to obtain the consent of the second mortgagee, and that the expression in s 94(1) “any third person as the mortgagor directs” should be interpreted in that light. His Honour states at the foot of p 61:

> Such a third person, in this context, does not include a person who is no more than the alter ego of the mortgagor. It refers to the new lender who, of course, must be nominated by the mortgagor, who has arranged the loan to pay out the existing mortgagee. The sections, in my opinion, have no relevant function where the mortgagor is providing the funds to pay out the first mortgagee.

[39] (1981) 146 CLR 56

Ley v Scarff remains the law on this point, as witnessed by its application by the Full Court in Queensland in *Corozo Pty Ltd v Westpac Banking Corp (No 2)*[40], and in NSW by Young J in *Challenge Bank Ltd v Hodgekiss*[41].

2. Right of subsequent mortgagee to demand a transfer

Section 95 of the Conveyancing Act provides as follows:

> The right of the mortgagor under the last preceding section shall belong to and be capable of being enforced by each incumbrancee or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancee shall prevail over a requisition of the mortgagor, and as between incumbrancees a requisition of a prior incumbrancee shall prevail over a requisition of a subsequent incumbrancee.

The above rather turgid prose provides that the right under s 94 can be exercised by either the mortgagor or a subsequent mortgagee; if both mortgagor and a subsequent mortgagee seek to exercise the right, then the subsequent mortgagee's wishes shall prevail; and if two or more subsequent mortgagees wish to exercise the right then the mortgagee with the prior mortgage shall prevail.

3. Where subsequent mortgage is an equitable mortgage

In *Corozo Pty Ltd v Westpac Banking Corp (No 2)*[42], Corozo, and unregistered (and hance equitable) mortgagee was held to have the rights of a "mortgagor" under the Queensland equivalent of s94 of the Conveyancing Act (coincidentally also numbered s94). It follows that an equitable mortgagee of Torrens System land also has the right to redeem.

4. Interest rate on monies expended redeeming a prior mortgage

If the subsequent mortgagee (or its nominee) obtains a transfer of the redeemed mortgage (whether through s 94 or by a negotiated assignment by the first mortgagee), then the transferee of the redeemed mortgagee simply enforces the transferred mortgage in order to recover the monies spent in redeeming the mortgage (plus any additional interest and costs that have since accrued, in accordance with the transferred mortgage).

If the subsequent mortgagee simply discharges the first mortgage without a transfer, then the subsequent mortgagee would claim the cost of redemption under the subsequent mortgage. These monies would be claimed under that mortgage as monies paid for the preservation of the security, and thus form part of the costs component of the subsequent mortgage debt.

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[40] [1988] 2 QdR 48
[41] (1995) 7 BPR 14,399
[42] [1988] 2 Qd R. 481

H. Post discharge considerations

1. Erroneously low payout figure

The usual rule when monies are paid or received under a mistake of fact as to the actual amount owing is that the party adversely affected by the mistake is entitled to have it corrected by a restitutionary claim for monies had and received. Thus a mortgagee who has erroneously discharged a mortgage for too little money is normally entitled to subsequently demand the outstanding balance notwithstanding the fact of discharge. This right can be lost, however, in various ways, such as by contract or estoppel.

Thus if a mortgagee enters into an agreement that a certain amount will be accepted in full discharge of the mortgage, the mortgagee cannot later demand a greater sum if the agreed amount was erroneously calculated. Estoppel can be created in many ways, the most likely being equitable estoppel arising from detrimental reliance. Thus if a mortgagor would suffer a substantial detriment as a result of acting on a mortgagee's erroneous advice (for example by entering into other transactions which, if properly advised by the mortgagee, he would realise he cannot afford), the mortgagee will likely be held to be estopped from claiming the remaining funds so as to avoid the mortgagor being in a worse position as a result of the mortgagee's mistake.

2. Erroneously high payout figure

Similarly, if a mortgagor overpays a mortgage debt by mistake, the mortgagor can normally recover the excess payment as monies had and received by the mortgagee. This is, however, subject to exceptions such as contract, estoppel, and monies paid under legal compulsion, as is referred to below.

3. Erroneously paid money in response to legal process

In *J&S Holdings Pty Ltd v NRMA Insurance Ltd*[43] Kelly J of the ACT Supreme Court notes another exception to the ability of a person to recover monies paid by mistake, being a rule that monies paid under pressure of legal process are not subsequently recoverable by the payer. His Honour stated the rule:

> Where money has been paid by the plaintiff to the defendant under the compulsion of legal process which is afterward discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received.

His Honour then quotes from *Moore v Vestry of Fulham*[44] as follows:

> The principle of law is… that money paid under the pressure of legal process cannot be recovered. The principle is based upon this, that when a person has had an opportunity of defending an action if he chose, but has thought proper

[43] (1981) 39 ACTR 1
[44] [1895] 1 QB 399 at 401-2

> to pay the money claimed in the action, the law will not allow him to try in a second action what he might have set up in the defence to the original action.

His Honour notes that this principle applies also "to moneys paid under the threat of legal process without its having been instituted".

If, however money is paid under "compulsion beyond the threat of legal proceedings", his Honour noted that the rule against recovery did not apply. The test his Honour adopted for "compulsion beyond the threat of legal proceedings" in this context is taken from the NSW Court of Appeal judgement in *Air India v Commonwealth*[45] being:

> …in general it must be established in order to show that a payment was made under compulsion that: (a) there was a fear that, if it were not paid, the payee would take some step, other than invoking legal process, which would cause harm to the payer; and (b) that this fear was reasonably caused or well-founded.

In *J&S Holdings Pty Ltd v NRMA Insurance Ltd*[46] the monies sought to be recovered were made in response to a threat to commence winding up proceedings. His Honour found that as threatening winding up was a threat of "legal proceedings" that the rule applied and that none of the monies could not be recovered even if the amount paid was in excess of the quantum of the debt then owing.

4. Discharge provided by mistake (when money still owing)

State Bank of New South Wales v Berowra Waters Holdings Pty Ltd[47] was a case heard by Needham J concerning a discharge of two mortgages - one of Torrens System land registered under the Real Property Act, and one of Old System land registered under the Registration of Deeds Act- in each case by accident. No final decision was made concerning the Old System land (and thus nothing more will be said here concerning that aspect of the case), but the Torrens System land component was decided by his Honour.

The precise details of the mistake that caused the discharges to be executed and registered is not revealed in the decision, but apparently both were executed and registered in circumstances where the mortgagee thought that the debt had been paid out, but in fact the debt had not been paid out.

The mortgagee claimed that in the circumstances the discharges were invalid and of no effect, and/or that they were in error and hence the Registrar-General had power to cancel the registration of the discharges. In relation to the Real Property Act discharge, the Registrar-General maintained that he had the power to cancel the registration, but was unwilling to do so without an order from the Supreme Court. The mortgagor claimed that the Registrar-General had no power to cancel the registration of the discharge and that the Court had no power to order him to do so. The mortgagor

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[45] [1977] 1 NSWLR 449 at 455,

[46] (1981) 39 ACTR 1

[47] (1986) 4 NSWLR 398

acknowledged that it remained liable under its personal covenant, so the issue was only whether there was a continuing mortgage as security for that personal covenant.

Needham J found that indefeasibility of title conferred by s42 of the Real Property Act worked in this instance in favour of the mortgagor. The mortgagor, by virtue of a registered dealing (the RPA discharge) held title to the security free of the former mortgagee's mortgage, and so unless the former mortgagee could establish one of the exceptions to indefeasibility, the mortgagee had no right to cancel the registration of the discharge. The mortgagee could, however, establish no such exception to indefeasibility on the facts of the case.

His Honour further found that the Registrar-General had no power to cancel the registration of the RPA discharge as the registration was not an "error" within the meaning of either RPA s 12(1)(d) or RPA s 136(1)(b), in the circumstances that RPA discharge was in proper form, the mortgagee intended it be lodged, and the Registrar-General made no error in recording the document.

It followed that his Honour found that neither the Court nor the Registrar-General had power to cancel the registration of the RPA discharge of mortgage.

5. Can discharge monies be a preferential payment?

i) Monies paid by a corporation

A preferential payment is a payment which would have the effect of giving a preference to a particular creditor by making a payment to that creditor and thereby reducing the assets available to the general pool of creditors. A preferential payment offends the basic principle that assets should be distributed fairly amongst creditors. Section 588FA (1) of the *Corporations Act 2001* provides:

> A transaction is an unfair preference given by a company to a creditor of the company if, and only if:
>
> a) the company and the creditor are parties to the transaction (even if someone else is also a party); and
>
> b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;
>
> even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

Monies paid to discharge a mortgage would thus not be regarded as a preferential payment because section 588FA only applies to unsecured debts. However any payment in excess of the value of the security could be clawed back as a preferential payment pursuant to sub-section (2) which provides that a secured debt is taken to be unsecured to the extent that it is not reflected in the value of the security.

ii) Monies paid by an individual

Section 122 of the *Bankruptcy Act 1966* provides that a transfer of property by a person who is insolvent during the relevant relation back period is void against the trustee if it had the effect of giving a creditor a preference, priority or advantage.

Although the section does not distinguish between secured and unsecured debts, the position is the same as a payment by a corporation. In *Bank of Australasia v Hall*[48] the Court held that "creditor" means "any person who…would have had to come in and prove rank with other creditors in the bankruptcy". A secured creditor may elect to enforce the security and apply any sum realised to discharge the debt and therefore, to the extent that the security is sufficient to cover the debt, a secured creditor need not prove rank with other creditors. It follows that s122 would not apply to any payment in discharge of a secured debt, but would apply if any payment was made in excess of the value of the security[49].

6. Tracing of monies paid upon discharge

Tracing is the process whereby equity permits monies paid in breach of a fiduciary duty by the payer into the hands of a payee who is not a bona fide recipient of those monies for value and without notice of the breach.

In the case of funds paid, in breach of the mortgagor's fiduciary duty, to discharge a mortgage, the mortgagee is entitled to retain the funds provided that they were received without notice of the breach of duty. The mortgagee will be a recipient for value of the monies as payments made by a mortgagor to a mortgagee in accordance with a mortgage are payments for value – see for example National Australia Bank Ltd v Rusu[50].

If the mortgagee knows at the time of payment that the monies being paid by the mortgagor do not belong to the mortgagor (for example the mortgagee knows that they are trust monies or have been embezzled from their rightful owner), then the rightful owner of the monies can recover the amount paid from the mortgagee by tracing the funds into the mortgagee's hands.

7. All monies mortgages

Generally if the debt under an *all monies* mortgage is repaid then the mortgage will be extinguished and any monies subsequently loaned by the mortgagee to the mortgagor will not be secured.

In *Estoril Investments Pty Limited v Westpac Banking Corporation*[51] Young J considered with approval a number of guidelines to be applied when construing all money clauses. One of these guidelines was for courts to construe all monies mortgages "provided that the language permits them to do so" such that "Once the original debt has been fully discharged, the mortgage is extinguished and cannot secure future loans". However his Honour noted that these guidelines may give way

[48] (1907) 4 CLR 1514 at 1536
[49] See also *Court v Hewett* (1981) ALR 627
[50] [2001] NSWSC 32
[51] (1993) 6 BPR 13,146,

to the construction of the individual mortgage. The passage was cited with approval by Santow J in *Modular Design Group Pty Ltd*[52].

Thus unless a mortgage by its clear and unambiguous words provides that the mortgage is to continue notwithstanding the repayment of all monies currently due under it, the satisfaction of all obligations secured under an all monies mortgage has the effect of extinguishing that mortgage.

8. Effect of the Limitation Act on the discharge of mortgages

S 41 of the Limitation Act 1969 reads:

> An action on a cause of action to redeem mortgaged property in the possession of a mortgagee is not maintainable against that mortgagee if brought after the expiration of a limitation period of twelve years running from the only or later of such of the following dates as are applicable:
>
> a) the date on which that mortgagee or a person through whom the mortgagee claims last goes into possession of the property in respect of which the action is brought, and
>
> b) the date on which that mortgagee or a person through whom the mortgagee claims last receives a payment of principal money or interest secured by the mortgage from the plaintiff or from a person through whom the plaintiff claims.

Section 40 of the Limitation Act, however, states:

> This Act applies to an action on a cause of action founded on a mortgage registered under the *Real Property Act 1900* to recover from any person any debt damages or other money payable under the mortgage, but otherwise, except to the extent that this Act is taken into consideration for the purposes of a possessory application under Part 6A of that Act, this Act does not affect the right title or remedies under a mortgage so registered of a registered proprietor under that Act of the mortgage or of the mortgaged land.

Section 40 does not prevent s 41 from applying with respect to an equitable mortgage of Real Property Act land, although s 45C of the Real Property Act effectively prevents an equitable mortgagee from gaining any benefit from the drafting of s 40. RPA s 45C(1) says:

> Except to the extent that statutes of limitation are taken into consideration for the purposes of this Part, no title to any estate or interest in land adverse to or in derogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any statute of limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of any such statute.

S 45D(1) of the RPA (which, with s 45C, is in Part 6A of the RPA) then provides:

[52] (1994) 35 NSWLR 96, at 101-2

(1) Where, at any time after the commencement of this Part, a person is in possession of land under the provisions of this Act and:

a) the land is a whole parcel of land,

b) the title of the registered proprietor of an estate or interest in the land would, at or before that time, have been extinguished as against the person so in possession had the statutes of limitation in force at that time and any earlier time applied, while in force, in respect of that land, and

c) the land is comprised in an ordinary folio of the Register or is comprised in a qualified or limited folio of the Register and the possession by virtue of which the title to that estate or interest would have been extinguished as provided in paragraph (b) commenced after the land was brought under the provisions of this Act by the creation of the qualified or limited folio of the Register,

that person in possession may, subject to this section, apply to the Registrar-General to be recorded in the Register as the proprietor of that estate or interest in the land.

Thus if either a registered or equitable mortgagee of Real Property Act land takes possession of the security property and maintains that possession for 12 years without any payment being made under the mortgage, the mortgagee can then apply to the Registrar-General under RPA s 45D for the registered title to be transferred to the mortgagee, on the basis that the mortgagor’s right to redemption has been extinguished under s 41 of the Limitation Act.

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