A paper presented for The Continuing Professional Education Department of the College of Law on 10 October 2005

The Rights of Mortgagors

Published in Sydney by the Continuing Professional Education Department of the College of Law, 2 Chandos Street, St Leonards, NSW, Australia, 2065.

ABOUT THE PRESENTER

Matthew Bransgrove holds a Bachelor of Laws and was admitted to the NSW Supreme Court in 1992. He has practised exclusively in the field of mortgage law since 1998.

He is a co-author of the 2008 LexisNexis textbook 'The Essential Guide to Mortgage Law in NSW' and the 2013 LexisNexis textbook 'The Essential Guide to Mortgage Law in Australia'.

His articles in the NSW Law Society Journal and his textbook have been cited with approval by the NSW Supreme Court. Chandra v Perpetual Trustees Victoria [2007] NSWSC 694; Perpetual Trustees Victoria v Kirkbride [2009] NSWSC 377; Bank of Western Australia v Ellis J Enterprises [2012] NSWSC 313.

He has presented the following papers for the College of Law:

1. Enforcement of Mortgages *19 June 2003*
2. Indefeasibility of Mortgage Title *17 Nov 2003*
3. Mortgage Drafting in NSW *17 Mar 2004*
4. Mortgage Priorities *15 June 2004*
5. The Rights of Mortgagors *10 Oct 2005*
6. The Rights of Mortgagees *10 Nov 2005*
7. Mortgagees Power of Sale *23 May 2006*
8. Discharge of Mortgage *28 Nov 2006*
9. Contracts Review Act Defences to Mortgages *29 May 2007*
10. Equitable Defences to Mortgages *18 July 2007*
11. Variation, Assignment & Transfer of Mortgages *12 Sept 2007*
12. Mortgagor's power to mortgage *13 Nov 2007*
13. Regulatory Structure of Managed Investments *23 Feb 2008**
14. Licensing a Responsible Entity *20 March 2008**
15. Proportionate Liability in claims against Valuers *29 Oct 2008**
16. Examinations under the Corporations Act and ASIC Act *5 March 2012*†

**Presented jointly with Kate Cooper of Bransgroves Lawyers*
† *Co-authored by Lesa Bransgrove of Bransgroves Lawyers*

ACKNOWLEDGEMENT

The presenter gratefully acknowledge the extensive assistance of Marcus Young of University Chambers in the preparation of this paper. Mr Young specialises in equity and commercial law. He is co-author, with the presenter, of the Lexis Nexis textbooks *The Essential Guide to Mortgage Law in NSW (2008) and The Essential Guide to Mortgage Law in Australia (2013).*

TABLE OF CONTENTS

A. The rights of mortgagors

Mortgages are contracts. Being written by the mortgagee they tend to solely concern themselves with endowing the mortgagee with rights. To mitigate this one-sidedness Equity, and more recently the legislature, have created a range of mortgagor's rights, which for the most part cannot be contracted out of.

B. The rights to inspection of documents & production of the Certificate of Title

The mortgagor's right to inspect documents and have the title produced (in the case of Real Property Act land) is designed to assist the mortgagor to further encumber the security. These rights cannot be excluded but a covenant prohibiting the mortgagor from further encumbering the land is valid and so the rights can be rendered useless.

1. Section 96 of the Conveyancing Act

S 96 states:

> (1) A mortgagor, as long as the mortgagor's right to redeem subsists, shall by virtue of this Act be entitled from time to time at reasonable times on the mortgagor's request, and at the mortgagor's own cost and on payment of the mortgagee's costs and expenses in this behalf by the mortgagee, the mortgagee's solicitor or licensed conveyancer, to inspect and be supplied with copies or abstracts of, or extracts from, the documents of title or other documents relating to the mortgaged property in the custody or power of the mortgagee.
>
> (2) This section applies to mortgages under the Real Property Act 1900, and in such case the mortgagor shall be entitled to have the relevant certificate of title, or other document of title, lodged at the office of the Registrar-General, to allow of the registration of any authorised dealing by the mortgagor with the land, upon the payment of the mortgagor's proper costs and expenses.
>
> (3) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

S 7 of the Conveyancing Act defines "mortgagor" as follows:

> Mortgagor includes any person from time to time deriving title to the equity of redemption under the original mortgagor, or entitled to redeem a mortgage, according to the person's estate, interest, or right in the mortgaged property.

The High Court in *Corin v Patton*[1] noted the importance of the dealing being by the mortgagor and not by some other person. In that case a transferee of the mortgagor's interest seeking to register a transfer failed on a dual basis as (absent registration of the transfer) he was not a person capable of redeeming the mortgage, and hence not a

[1] (1990) 169 CLR 540 at 561

"mortgagor", and because the dealing was his own and not "an authorised dealing by the mortgagor".

The expression "authorised dealing" is nowhere defined, but presumably refers to a dealing in the form authorised by the Real Property Act, or in other words a dealing in registrable form.

S 96 thus allows, on the paying of the mortgagee's proper expenses, a mortgagor to inspect the certificate of title of a property, and to require the same to be lodged at the Land Titles Office for the purpose of registering a dealing. As sub-section (3) makes clear, it cannot be contracted out of.

2. Section 12 of the Real Property Act

A subsequent unregistered mortgagee is a "mortgagor" within the meaning of the Conveyancing Act: see *Corozo Pty Ltd v Westpac Banking Corp (No 2)*[2]. A second or subsequent mortgagee can therefore write to a first mortgagee and request that the Certificate of Title be produced to allow for the registration of its mortgage. If the first mortgagee refuses (or does not reply to the request for 14 days) an application can be made to the Registrar-General of the LPI to require the production.

Section 12(1)(a) of the Real Property Act provides:

> "The Registrar-General may require any person who may have possession or control of an instrument relating to land the subject of a dealing, or relating to the title to any such land, to produce that instrument, and the Registrar-General may retain any such instrument, whether produced pursuant to this paragraph or otherwise, until it is no longer required for action in connection with a dealing lodged with the Registrar-General."

Using this power the Registrar-General will then write to the first mortgagee requiring production. If the first mortgagee refuses or fails to produce the LPI then cancels the current edition, registers the subsequent mortgage and then issues a new edition (showing the registration).

3. Unregistered mortgages

Unregistered mortgages are not "mortgages under the Real Property Act" as that act requires mortgages to be registered. Thus although 96(1) applies to require the mortgagee to permit inspection of the Certificate of Title (if held by the mortgagee) and other documents related to the title (including the mortgage), 96(2) has no applicability (being limited to "mortgages under the Real Property Act") so there is no requirement for a mortgagee to lodge the Certificate of Title with the Registrar-General pursuant to a request by the mortgagor if it is held by the mortgagee.

[2] [1988] 2QdR 481

C. The right to further encumber the property

1. The nature of a second mortgage under old system land

The interest in the land retained by the mortgagor ie: the equity of redemption, could itself be mortgaged. Thus a second mortgage under the old system was a mortgage of the equity of redemption.

2. The nature of a second mortgage under Real Property Act Land

In *Nia v Phuong*[3] Young J noted, in relation to Real Property Act land:

> "A registered proprietor of land who grants a mortgage to a mortgagee, even after the mortgage is registered, remains the proprietor of a congerie of legal rights over which prima facie he or she has the power of mortgage or other disposition as with any other proprietary right."

This "congerie of legal rights" includes the equity of redemption but is not strictly limited to that equity, as a mortgagor of Real Property Act land has more extensive rights over the security than is the case of a mortgagor under old system title (under which the mortgagor loses all legal title to the security but only retains the equity of redemption).

In *Quint v Robinson*[4], Young J determined that the interest of a Real Property Act mortgagor in land did not fall within the definition of "equity of redemption" contained in the Judgement Creditors Remedies Act 1901, as although an "equity of redemption" was possessed by the mortgagor in the sense that the mortgagor had the right to approach a court to compel the mortgagee to discharge the mortgage upon payment out, a Real Property Act mortgagor has a legal interest in the land and not merely an equitable right.

3. Can the right to further encumber the property be contracted out of?

Young J stated in *Nia v Phuong*[5], immediately after the passage quoted above and in reference to the right of a mortgagor to mortgage the "congerie of legal rights" remaining after the previous mortgage:

> "It is, of course, competent for the mortgagor to covenant that he or she will not exercise this right, but if such a covenant is made, it by no means follows that the mortgagor is deprived of the capacity to mortgage the land, it may well be that the only remedy the mortgagee has is in damages."

4. The mortgagees remedies for breach of a covenant not to further encumber?

The above statement that the mortgagee has no remedy other than damages, only describes the situation in which the subsequent mortgage has already been registered. His Honour was prepared in *Nia v Phuong* to grant an injunction at the suit of the first mortgagee to prevent the incoming second mortgagee from registering the second mortgage in breach of the stipulation in the first mortgage prohibiting subsequent

---

[3] (1993) 6 BPR 97440 at 13,142
[4] (1985) 3 NSWLR 398
[5] (1993) 6 BPR 97440 at 13,142

mortgages. This injunction was justified by his Honour on a dual basis. Firstly, an incoming second mortgagee is on constructive notice of all interests recorded on title and the terms of those interest, and thus had constructive notice of the prohibitive clause in the first mortgage, his Honour then determining that equity would restrain the prospective second mortgagee from acting in breach of a negative covenant of which he had notice. Secondly, his Honour found that as no registration of the second mortgage could occur without a memorandum signed by the registered proprietor of the land, the proposed second mortgagee was seeking registration of the second mortgage as an agent of the mortgagor, and as such would be caught in any event by any injunction issued against the mortgagor restraining registration.

D. The right to the principal

The obligation to advance the principal is one of the few positive covenants by the mortgagee necessarily included or implied into a mortgage.

1. Can the obligation to advance the principal be contracted out of?

In *Aziz v GIFC Ltd*[6] the lender was found to be in breach of a loan for failing to advance monies even though the loan agreement had been drafted so as to attempt to exclude such liability.

Aziz & others entered into a contract to purchase a property on which they intended to construct a retirement village and approached the GFIC for a loan which was to be secured over three separate properties owned by the Aziz & others. Loan approval was offered by the GIFC and accepted by the Aziz. The loan amount approved was for $1,600,000 consisting of an initial loan of $570,000 and a construction loan of $1,300,000 to be drawn down within a nine month period. The loan approval had a "cancellation clause" in the following terms:

> "GIFC Limited reserves the rights:
>
> 1. To amend or withdraw this approval
> 2. To decline to make the loan advance
>
> GIFC Limited will not be obliged to state any reason for acting under this provision."

The GIFC allowed the Aziz to settle the contract for sale of land without security over the remaining two properties as valuations could not be conducted. To affect the loan for the purchase the defendant again sent out a further loan approval in the same form as the earlier approval which was accepted by the plaintiffs. The amount of the initial advance was to be $470,000.00. The defendant however only advanced $300,000.00. Correspondence was subsequently sent to the defendant by the plaintiffs' solicitor stating that the plaintiffs would not be proceeding with the balance of the loan ($170,000).

There followed certain conduct by GIFC appearing to confirm the existence of the construction loan (for $1,300,000) after which the GIFC informed the plaintiffs that it would not finance the construction project any further.

[6] (1988) NSW ConvR 55-427

Giles J found that GIFC was liable to the plaintiffs for damages for breach of contract in failing to make available the construction loan. His Honour found that the cancellation clause in that form did not give GIFC an entitlement at any time to decline to proceed with the advances to Aziz & others. His Honour concluded:

> "As a matter of construction the second limb of the cancellation provision refers to the entirety of the loan, so that whatever effect it might otherwise have does not extend to enabling GIFC to make part of the advance and then to decline to make the balance thereof. Again as a matter of construction by contrast with the second limb the first limb refers to the approval as distinct from the loan and must be limited to the situation when there is no more than an approval from GIFC. Again whatever effect it might otherwise, it does not extend to enabling GIFC to "amend or withdraw" so as to decline to make the balance of the loan when it has already made part thereof. It follows that the cancellation provision does not have the effect, in the present circumstances, of giving to GIFC an option or discretion to refuse performance. [7]"

In another case there was a different result. In *Murphy v Zamonex Pty Ltd*[8](also heard by Giles J), a loan facility for a major property development was documented in a deed of loan, a guarantee and a mortgage. The loan facility available was an initial advance of $2,400,000 with further advances in accordance with the terms of a letter of commitment from the trustee of a mortgage trust.

Three progress payments were made and then the borrowers were informed that no further funds were available and no further payments were made. The lenders argued that the provisions of the loan facility as a whole gave it an entitlement to provide the "further advances" at its absolute discretion. The borrowers submitted that the refusal to make further payments under the facility amounted to a breach of contract. His Honour found for the lenders on this issue.

In order to have a proper understanding of Giles J's judgment and compare his decision to *Aziz* it is necessary to examine the relevant clauses in the loan facility. The "commitment letter" sent to the borrower contained the following passage:

> "Progress Payments: In the event that the mortgage loan is to be advanced progressively, such 'progress payments' as may be required shall be made at the Trustee's discretion."
>
> (Underline added)

The deed of loan provided that the trustee agreed to make a loan available "up to the Facility Limit" and:

> "The facility shall be provided to the borrower by way of an initial advance upon settlement in the amount of two million four hundred thousand dollars ($2,400,000) to be secured by the secured property…

[7] at 57,880
[8] (1993) 31 NSWLR 439

> The borrower may request and the lender may make further advances up to the amount of the facility limit in accordance with the terms of approval of the facility contained in the letter of offer …"
>
> (Underline added)

The mortgage contained inter alia the following covenant:

> "The Mortgagor hereby acknowledges that the balance of the principal sum shall remain in control of the Mortgagee and shall be paid and advanced to the Mortgagor by instalments of such amount and at such times as the Mortgagee shall at it's sole discretion determine for or on account of building and development works on the mortgaged property."
>
> (Underline added)

There was an additional typed covenant in the following terms:

> "The advance by the Mortgagee of any further funds pursuant to the facility secured by this Mortgage beyond the initial advance referred to in Item 5 of the Schedule hereto will be at the absolute discretion of the Mortgagee…"
>
> (Underline added)

Giles J stated[9]:

> "[The lender's] stated obligation was (relevantly) to provide an amount "up to" the facility limit. The initial advance (in relation to which the word "shall" stood in contrast with further advances (in relation to which the word "may" was used, and the provision by which the making of further advances included a discretion referred in the commitment letter and the mortgage. They were in most ample terms."

He concluded:

> "It seems to me that the typed additional covenants of the mortgage and the terms of the deed of loan and the commitment letter, are dominant in ascertaining the intention of the parties. There was a discretion and it was absolute."

Comparing *Murphy* and *Aziz*

Although Giles J reached opposing conclusions in *Murphy* and *Aziz*, each case turned on the proper construction of the clauses within the respective loan documents. In *Murphy* the material comprising the loan facility made specific and separate provision for the mortgagee's entitlements in relation to continuing "progress payments" made after the initial advance, and made it clear that such further payments were entirely discretionary.

Conversely the second limb of the "cancellation clause" in *Aziz* (containing the power to decline to make a loan advance) was property referable to the whole of the loan. Accordingly once payments had commenced, there was no entitlement under that clause to "decline" further advances. Further, as noted by Giles J, the first limb of the "cancellation clause" is limited in its application to a situation where there is nothing

[9] at p 453

more than an approval by the lender (and no advances have been made under the loan). Accordingly the lender could not properly rely upon a clause drafted in *that* fashion to withhold payments once the initial advance had been made.

2. Damages for failure to advance the principal

Where a lender fails to make an advance to a borrower in accordance with the terms of a loan agreement, the borrower is entitled to relief by way of damages. In *Aziz v GIFC Ltd* the relief sought and granted was damages. Also see *South African Territories Ltd v Wallington*[10].

3. Specific performance for failure to advance the principal

Traditionally, equity has not granted an order for specific performance of a contract for the loan of money. However this is not an invariable rule, and a borrower may be entitled to an order for specific performance, where the remedy in damages would not satisfy the demands of justice.

4. Specific performance generally

Specific performance is a remedy offered by equity in cases of breach of contract where the remedy available at common law is not adequate, particularly where the plaintiff has fully performed his or her contractual obligations. The usual situation is where a judgement for damages cannot truly put the plaintiff back into the same position the plaintiff would have been in if the contract had been completed, either because the subject of the contact was unique and a replacement cannot be obtained elsewhere (such as with a contract for purchase of a particular block of land or a rare chattel) or because proper calculation of damages is not practically feasible.

Specific performance may also be available when the plaintiff would, in the absence of a decree, be forced to bring multiple actions to obtain the defendant's promised performance; because only nominal damages would be available at common law; or because the defendant's promise is to pay money to a third person: see, for example, *Beswick v Beswick*[11].

5. Specific performance where the mortgagors faces ruin

In *Corpers (No 664) Pty Ltd v NZI Securities Australia Ltd*[12], Young J dealt with a case where a lender had entered into a loan agreement to advance money for the purchase of an office block, but the lender had reneged on that agreement. His Honour, rejected the contention that "there is no jurisdiction in equity to grant specific performance of a contract for the making of a loan in appropriate cases", but went on to state:

> "It seems to me that the rule is that ordinarily specific performance will not be granted in this sort of case, but there may be special factors which will take a case out of the ordinary situation and where those special factors exist equity will grant specific performance. Those special factors will include the case where an agreement is fully performed on one side and it will also include a situation where the plaintiff's whole enterprise is lost if the defendant does not fulfil its promise. It

[10] [1898] AC 309
[11] [1968] AC 58
[12] (1989) ASC 55-714

may include other circumstances, but what they are will have to be worked out by the courts in the future."[13]

See also *Angelatos v National Australia Bank*[14] described below where specific performance was ordered under s86 of the TPA because otherwise a receiver would be appointed.

6. Specific performance when borrower motivated solely by profit

In *Corpers*[15], Young noted that there was no evidence that alternative funding was not available to the borrower. Also, as the borrower's motivation was held to be only the making of money, his Honour considered that an award of monetary damages should be equally satisfactory to the borrower. His Honour then refused to grant specific performance.

7. Specific performance where there is difficulty in quantifying damages

In *Wight v Haberdan Pty Ltd*[16], the plaintiff contracted to purchase land at Wilberforce from the first defendant. The second defendant, Beneficial, lent to the plaintiff certain monies secured over a property known as Bowd's Farm. A dispute arose as to whether a valid and enforceable agreement existed between the plaintiff and the second defendant to advance further monies secured against the Bowd's Farm property. In the event such an agreement existed, the plaintiff sought to compel Beneficial to provide the finance in time for him to complete the purchase of the Wilberforce property.

This case is significant in that Kearney J identifies a set of circumstances where a claim for damages may be inadequate. Of relevance was the complexity of and difficulty in quantifying such a claim. His Honour said:

> "In the present instance it is obvious that if the plaintiff is left to pursue common law claims for damages the most complex questions will arise. There will be necessarily difficult questions as to the measure of damages and the remoteness of damage. There will be obviously great delay and expense and at the end of the day the question of what damages could be awarded would, in my view, be extremely difficult, if not virtually impossible, to asses with reasonable accuracy."

His Honour went on to say:

> "…the complications involved in the plaintiff being left to pursue a claim for damages in this instance are so monumental and the prospects of an adequate recovery so remote as to render such a course an unjust imposition upon the plaintiff." [17]

---

[13] at p 418
[14] (1994) ATPR 41-333
[15] ibid
[16] [1984] 2 NSWLR 280
[17] at 290

8. Specific performance where there is part performance

Justice Kearney also held (in *Wight v Haberdan Pty Ltd)*where there had in effect been part performance of the contract, an order for specific performance would be the more appropriate remedy. In support of this view his Honour cited *Coulls v Bogot's Executor and Trustee Co Ltd*[18] and the following statement of Kay J in *Hart v Hart*[19]:

> "…when an agreement for valuable consideration …has been partially performed, the Court ought to do its utmost to carry out that agreement by a decree for specific performance."

His Honour in *Wight* also seemed to place reliance on the financial impact on the plaintiff arising out of the "last minute repudiation" of the contract leading to the "collapse of the plaintiff's enterprise" (as alluded to by Young J in *Corpers*).

9. Specific performance of a "mere contract for a loan"

A would-be borrower's right to specific performance was the subject of consideration of the New Zealand High Court in *Pacific Industrial Corporation SA v Bank of New Zealand*[20]. In considering what type of lending agreements may be the subject of an order for specific performance in favour of the borrower Thomas J gave consideration to what he termed a "mere" contract for loan. His Honour[21], in reference to dicta in *Loan Investment Corporation of Australasia v Bonner*[22] which included the statement that "a mere contract for a loan of money will not be specifically enforced", said:

> "It is observed that in the above dicta the so-called rule is restricted to what is described as a "mere" contract for a loan of money. But some arrangements cannot fairly be described as "mere" contracts for the loan of money. They can be enormously complicated and involve sequential responsibilities which may all collapse if the first loan is not enforced. I do not therefore believe that any such rule can be applied on a rigid basis."

10. Relief under the Trade Practices Act

In *Angelatos v National Australia Bank*[23], Branson J considered the application of a borrower's right to specific performance in the context of anticipated orders under section 87 of the Trade Practices Act (which orders may include a statutory equivalent of specific performance). His Honour said:

> "In my view the rule that ordinarily specific performance will not be granted when the contract is one to lend money does not necessarily restrict the powers of a court under section 87 to frame such order or orders as the section envisages. However, in determining whether or not to make such order or orders, the court will no doubt take into account those principals which lie behind the ordinary rule." [24]

---

[18] (1967) 119 CLR 460
[19] (1881) 18 Ch D 670 at 685
[20] [1991] 1 NZLR 368
[21] at p 376
[22] [1970] NZLR 724
[23] (1994) ATPR 41-333
[24] at p 42,403

His Honour proceeded to grant interlocutory relief under the section that was virtually equivalent to specific performance. The evidence in the case showed that if the facility promised by the lender was withdrawn receivers would be appointed to the borrower, which receivers would cause irreparable financial damage which would be difficult to quantify.

E. The right to have the mortgage transferred (instead of discharged)

1. Section 94 of the Conveyancing Act

S 94 of the Conveyancing Act reads 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*[25]. By reason of sub-section (3) it cannot be contracted out of.

2. Can the transferor be liable to the transferee?

If the outgoing mortgagee makes some warranty or representation to the incoming lender that the existing mortgage is valid and enforceable and thereby induces the incoming lender to pay out the existing mortgage in exchange for a transfer the outgoing mortgagee could be liable for damages.

A common basis on which a mortgage might be partially or wholly unenforceable is if a contract's review act defence is successfully raised. The outgoing mortgagee should thus take care to assert in writing that no warranty is made as to the validity or enforceability of the mortgage being transferred.

[25] (1981) 146 CLR 56

3. The effect on personal covenants of a transfer under s94.

The personal covenants are assigned as well as the mortgage, as debts are choses in action capable of being assigned at law. Thus the transferee can bring a personal claim against the mortgagor in debt as well as (or in lieu of) suing to enforce the proprietary rights granted by the mortgage.

4. Can the transferor be the mortgagor?

In *Ley v Scarff*[26], 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 stated:

> "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."[27]

Ley v Scarff was applied in Queensland by the Full Court in *Corozo Pty Ltd v Westpac Banking Corp (No 2)*[28], and in NSW by Young J in *Challenge Bank Ltd v Hodgekiss*[29].

5. Section 95 of the Conveyancing Act

Section 95 of the Conveyancing Act provides that the right under s94 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.

F. The right to possession

The general rule is that anyone's right to possession of land is paramount except if there is another person with a superior right. Thus in discussing the mortgagor's right to possession it becomes a question of when does the mortgagee displace that right.

---

[26] (1981) 146 CLR 56
[27] at p 61
[28] [1988] 2 QdR 48
[29] (1995) 7 BPR 14,399

1. Section 60 of the Real Property Act

S 60 of the Real Property Act provides:

> "The mortgagee…. upon default … of any … covenant … may:
>
> (a) enter into possession of the mortgaged … land by receiving the rents and profits …, or
>
> (c) bring proceedings in the Supreme Court …. for possession of the … land, either before … or after any sale …. effected under the power of sale given or implied in the mortgage, charge or covenant charge,
>
> in the same manner in which the mortgagee… might have … brought such proceedings if the principal … were secured … by a conveyance of the legal estate in the land…."

In other words, section 60 of the Real Property Act provides to a mortgagee the same rights to possession of mortgaged Real Property Act land upon default as are possessed by an Old System Title first mortgagee.

2. The rights of an Old System mortgagee

The rights of Old System Title first mortgagee are from the common law. Unlike the position with Real Property Act mortgagees, such a mortgagee can take possession of the security at any time, even without any default on the part of the mortgagor, unless there is an express or implied term in the mortgage (or some other contract) preventing the mortgagee from so doing: see for example *Four-Maids Ltd v Dudley Marshall (Properties) Ltd*[30], where it was said of an Old System legal mortgage:

> "The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right." [31]

See also Western Bank Ltd v Schindler[32], in which it was found that in the absence of an express term keeping the Old System mortgagee out of possession, a term to that effect would not be lightly implied.

3. The right to possession under an equitable mortgage

The rights of equitable mortgagees are not governed by the Real Property Act, which deals only with registered mortgages. Thus s60 of the RPA is of no assistance to an equitable mortgagee. As the Conveyancing Act does not confer any power of possession to any mortgagee, the equitable mortgagee must instead look to case law.

---

[30] [1957] 1 Ch 317
[31] at p 320
[32] [1977] 1 Ch 1

In *Barclay's Bank v Bird*[33], Harman J stated:

> "The bank had… an equitable mortgage which gave it all the rights of equitable mortgagees. It was entitled, therefore, as any other equitable mortgagee is entitled, to come to the court and take out a summons asking for possession. It does not matter from that point of view that the mortgage is equitable. The only limitation on an equitable mortgagee in that respect is that he has no right to possession until the court gives it to him."

In *Mills v Lewis*[34], the NSW Court of Appeal determined to bring a common law action for possession of land, there must be "a right of entry" and:

> "A right of entry meant a legal right to enter and take actual possession of land as incident to some estate or interest therein. Furthermore, "the right must be a legal right; a mere equitable right is not sufficient"[35].

The Court of Appeal then found that an equitable mortgagee had no legal right to possession, only an equitable right, hence that an equitable mortgagee has no right to possession (in the sense of a right to bring an action in ejectment). In the mortgage, however, there was an express power for the equitable mortgagee to take possession in the event of default, and that the mortgagee hence had a contractual right to possession which could be specifically enforced through the court granting a judgement for possession and issuing a writ of possession.

It is arguable from the previously cited passage in *Barclay's Bank v Bird* that an equitable mortgagee has an implied right to possession on default even if there is no express term in the mortgage providing that right, and thus there will be a term implied into the mortgage giving the mortgagee a right to possession on default which implied term can then be the subject of a claim for specific performance. Mortgagees can put the matter beyond doubt by including an express term in their mortgage granting a right to possession on default.

4. Section 11 of the Conveyancing Act

Although s 11 of the Conveyancing Act is not limited in its application to Old System Title lands, it has no importance with respect to land under the Real Property Act. The section gives the mortgagor of land the right to sue third parties, in the mortgagor's own name, for possession of the security, provided the mortgagee has not itself called for possession. The purpose of the section was to remove the difficulty that might otherwise have been created under Old System Title whereby the first mortgagee is the legal owner of the property and the mortgagor has only an equitable interest. Under the Real Property Act, however, the mortgagor is the legal owner of the security and as such can sue third parties for possession of the security without the need to invoke s 11 of the Conveyancing Act.

---

[33] [1954] 1 Ch 274 at 280
[34] (1985) 3 BPR 9421
[35] at p9431

G. The right to lease the property

A mortgagor has the right to lease the security, but in most cases the lease is not binding on a registered mortgagee, but only binds the mortgagor and tenant. In the case of an equitable mortgage, one applies the usual priority rules to determine whether the lease or the mortgage prevail.

1. Section 53(4) of the Real Property Act

s 53(4) of the Real Property Act provides:

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

Thus a lease entered into after the mortgage has been registered is only binding on the registered mortgagee if that mortgagee has consented to the lease before it was registered.

2. Short term lease

A short term lease (being a lease for 3 years or less complying with RPA s 42(1)(d)) is a legal interest in the security and will rank in priority ahead of a prior unregistered mortgage if the lease was obtained for value, in good faith, and without notice of the mortgage, but otherwise the mortgage will have priority.

3. Unregistered long term lease

An unregistered long term lease (not being a lease for 3 years or less complying with RPA s 42(1)(d)) is an equitable interest. In any competition between an unregistered long term lease and an unregistered mortgage, the first in time will have priority unless the holder of the first interest in time is guilty of postponing conduct, or if the holder of the second interest took for value and without notice of the first interest and holds a registrable dealing and the certificate of title to enable registration to occur (s 43A of the Real Property Act).

4. The effect of registration of the lease?

As s 53(4) of the Real Property Act provides, mere registration of a lease over land does not affect the interest of a prior registered mortgagee of that land unless the mortgagee has consented to the lease prior to the registration of that lease.

In the case of an equitable mortgage, however, registration of a lease over the security would cause the lease to have priority over the equitable mortgage by virtue of RPA s 42 (the well-known indefeasibility section), as the lease would then be a registered interest whilst the mortgage would not be registered (or if later registered, would be registered second in time). A prudent equitable mortgagee would, however, have a caveat in place on the security to prevent such registration.

5. Can the mortgagee withhold consent?

Unless the mortgagee is contractually bound to consent to registration of a lease, the mortgagee can withhold that consent. If the mortgage (or some other contract between

mortgagor and mortgagee) provides that the mortgagee must not unreasonable withhold consent, then the mortgagee is bound by that term.

6. Implied consent?

An issue that can arise in relation to leases of mortgaged land is whether the mortgagee has consented to the lease. Consent is relevant not only to RPA s 53(4), but also to the position at common law. In *AMEV Finance Ltd v Canagon Engineering Pty Ltd*[36], Young J stated;

> "There will… be some situations where the mortgagee will so act that as a matter of common law he will recognise the tenant as his tenant and so be bound by a lease at law by way of estoppel."[37]

His Honour then proceeded on that same page to note:

> "It is a question of fact as to what acts are sufficient for a tribunal to conclude that there has been such conduct on behalf of the mortgagee that he is to be considered to have consented to the grant of a lease between himself and the mortgagor's tenant. Usually receipt of rent by a properly appointed receiver or by the mortgagee itself under authority is insufficient…"

There does not appear to be any case law where this has happened.

H. The right to redeem the mortgage

1. The equity of redemption

Under Old System Title, the first mortgage of land involved the conveyance of the security to the first mortgagee so that mortgagee was then the legal owner of the land. The only right the mortgagor was left with (apart from any contractual rights under the mortgage deed, which commonly, although not invariably, included a right to remain in possession of the land pending default) was the right to approach a court of equity to compel the first mortgagee to reconvey the security to the mortgagor if the obligations secured by the mortgage had been discharged (or a discharge was proffered). It is this equitable right that is commonly referred to as the "equity of redemption".

The equity of redemption exists whether or not there is any contractual provision in the mortgage expressly granting the right to redeem to the mortgagor. Indeed, the application of the equitable maxim "once a mortgage, always a mortgage" preserves the equity of redemption notwithstanding any attempt in the mortgage by express terms to extinguish it.

The equity of redemption could itself be mortgaged by the mortgagor, and that was the basis for second mortgages under the Old System. Even after the mortgage of the equity, however, the mortgagor still possessed the right to redeem the equity of redemption from the second mortgagee upon payment of the second mortgage, and so this right could in turn be mortgaged to a third person to constitute a third mortgage.

---

[36] (1987) 6 BPR 13,899
[37] at p 13,901

In theory by this means any number of successive mortgages could be negotiated. The second and subsequent mortgagees were, however, in a fundamentally different position to the first mortgagee, as the first mortgagee had legal title to the land, whilst the subsequent mortgagees had no more than a right to the equity of redemption and were thus mortgagees only in equity and not at law.

Under the Torrens System, all registered mortgagees are legal mortgages. Although equitable mortgagees still exist in the form of persons holding unregistered mortgages, unlike their Old System predecessors Torrens System equitable mortgagees generally have the right (based in contract) to call for the registration of their mortgages and thus can turn their equitable interest into a legal interest. Thus even equitable mortgagees under the Real Property Act have a mortgage over more than just the equity of redemption (see *Quint v Robinson*[38]).

2. The right to redeem early – s93 of the Conveyancing Act

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.
>
> (2) For the purposes of this section "moneys owing under a mortgage" includes all costs, charges, and expenses reasonably and properly incurred by the mortgagee:
>
> (a) for the protection and preservation of the mortgaged land or the title thereto, or otherwise in accordance with the provisions of the mortgage, and
>
> (b) with a view to the realisation of the mortgagee's security,
>
> and in either case includes interest on the sums so expended after the rate expressed in the mortgage.
>
> (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* .

[38] (1985) 3 NSWLR 398

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 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.

In *Steindlberger v Mistroni*[39], Needham AJ found that s 93(3) did not preclude a mortgagee and mortgagor agreeing on terms more generous to the mortgagor with respect to early redemption. 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.

In *Myross v Kahlefeldt*[40], Barrett J follows *Steindlberger v Mistroni*, noting 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."[41]

In other words, when the mortgagor seeks early redemption, the mortgagor can rely on either the statutory or any contractual right of early redemption, and will presumably rely on whichever is the more attractive to the mortgagor.

The expression "mortgage" in the Conveyancing Act applies to both legal and equitable mortgages, thus this right also extends to equitable mortgagors.

3. Clogs on the equity of redemption

A "clog" on the equity of redemption is an impermissible hurdle imposed by the mortgagee by the terms of the mortgage upon the mortgagor obtaining redemption of the security. In terms of Real Property Act mortgages, however, it is more accurate to speak of impediments being imposed to the discharge of the mortgage.

In *Krelinger v New Patagonia Meat and Cold Storage Company Ltd*[42], this was said regarding clogs:

> "The rule may be stated thus: The equity which arises on failure to exercise the contractual right cannot be fettered or clogged by any stipulation contained in the mortgage or entered into as part of the mortgage transaction."[43]

In other words, even if the contractual right of redemption under the mortgage is limited by the terms of the mortgage, the equitable right to redeem is not restricted by such terms.

---

[39] (1992) 29 NSWLR 351
[40] (2003) 11 BPR 21,015
[41] at 21,017
[42] [1914] AC 25
[43] at p 48

Examples of matters held to be clogs on the equity include a stipulation in the mortgage requiring the mortgagor to continue a trade relationship with the mortgagee even after discharge (*Noakes & Co Ltd v Rice*[44]), a requirement that redemption take place within the life of a specified person (*Salt v The Marquess of Northampton*[45]), or the grant of an option to the mortgagee to purchase the security (*Samuel v Jarrah Timber and Wood Paving Corporation Ltd*[46]). These are all fairly old authorities, the concept of clogging the equity is discussed little modern authorities. The principal category of clog receiving recent attention is the "collateral advantage" (see below).

4. The rule against collateral advantages

A stipulation in a mortgage that the mortgagor can only redeem the mortgage by doing something additional to payment of the principal owing and interest thereon is a collateral advantage, and is only enforceable in certain limited circumstances. In the leading case of *Krelinger v New Patagonia Meat and Cold Storage Company Ltd*[47], it was held[48] that a stipulation conferring a collateral advantage on the mortgagee is only enforceable if it is not:

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

Young J in *Westfield Holdings Ltd v Australian Capital Television*[49] considered *Krelinger* and other earlier cases on collateral advantages and stated concerning the rule against collateral advantages:

> "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. It may be that the court presumes from the mere fact of a collateral advantage that the transaction is unconscionable unless there is evidence to the contrary, but the principal does not extend to invalidate automatically cases in which the mortgagee has obtained the right to purchase the whole or part of the mortgaged property in certain circumstances or has obtained a collateral advantage where the circumstances show that there has been no unfairness or unconscionable conduct."[50]

Although the above was no more than obiter dicta, it has since received support from the South Australian Full Court decision of *Epic Feast Ltd v Mawson KLM Holdings Pty Ltd*[51]. Young J's dictum represents a watering down of the law of collateral advantages in that unfairness and 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).

---

[44] [1902] AC 24
[45] [1892] AC 1
[46] [1904] AC 323
[47] [1914] AC 25
[48] at p 61
[49] (1992) 32 NSWLR 194
[50] at p 202
[51] (1998) 71 SASR 161

Quint v Robinson[52], although citing *Krelinger*, does not in any way contradict that case nor "water down" the rule against collateral advantages.

5. Damages for early repayment a clog?

Although the mortgagee cannot exclude by contract the statutory right of early redemption conferred by s 93 of the Conveyancing Act, the mortgagee is free to include in the mortgage an alternative contractual right of redemption on such terms as the mortgagee sees fit. No issue of a clog can arise, because if the mortgagor finds the contractual provision for early redemption to be unattractive, the mortgagor can instead exercise the statutory right.

6. Damages for late repayment, a clog, penalty or collateral advantage?

In *Cityland and Property (Holdings) Ltd v Dabrah*[53], Goff J was dealing with a case in which the sum of 2,900 pounds was borrowed for 6 years without any interest being specified but with the specification that the sum of 4,553 pounds would be repaid instead of merely the repayment of the 2,900 pounds originally borrowed. Although no interest was specified in the mortgage, the mortgagee claimed in the proceedings 5% per annum interest since default. The judge quoted at great length from *Krelinger v New Patagonia Meat and Cold Storage Company Ltd*[54], concluding with the following passage from p 61 of that decision:

> "… there is now no rule in equity which precludes a mortgagee, whether the mortgage be made upon the occasion of a loan or otherwise, from stipulating for any collateral advantage, provided such collateral advantage is not either (1) unfair and unconscionable, or (2) in the nature of a penalty clogging the equity of redemption, or (3) inconsistent with or repugnant to the contractual and equitable right to redeem."

His Honour then noted and adopted[55] the statement in Halsbury's Laws of England as follows:

> "… but a contract for payment to the mortgagee of a bonus in addition to the sum advanced is valid if the bonus is reasonable and the contract was freely entered into by the mortgagor."

His Honour then embarked on enquiry as to whether the premium of 57 per cent in the case before him could be classed either as "unfair and unconscionable" or "unreasonable". In this regard his Honour noted:

> "I do not think it is really open to the plaintiffs to justify this premium as being in lieu of interest because they claim interest on the aggregate of the loan and the premium; but even if it should be, then, taking the mortgage as a six-year mortgage… it would still represent interest at 19 per cent., which is out of all proportion to any investment rates prevailing at the time. Moreover, it was

[52] (1985) 3 NSWLR 398
[53] [1968] Ch 166
[54] [1914] AC 25
[55] at p 180

> expressly provided by the charge that, on default, the whole should immediately become payable."[56]

His Honour went on to note that the loan was secured "with a reasonable margin" and then stated that although the mortgagees "would have been entitled to charge a higher rate of interest than the normal market rate, or a reasonable premium comparable therewith, but nothing like the extent of 19 per cent looked at as an interest rate, or 57 per cent looked at as a capital sum". His Honour then set aside the entirety of the premium, although he then allowed the mortgagee to claim interest at 7 % per annum in lieu.

In *Multiservice Bookbinding Ltd v Marden*[57], the test of "unreasonableness" was rejected in favour of the test of "unfair and unconscionable", and Browne-Wilkinson J stated:

> "In my judgement there is no special rule applicable to contracts of loan which requires one to treat a bargain as having been unfairly made even where it is demonstrated that no unfair advantage has been taken of the borrower… However, if, as in the *Cityland* case [1968] Ch 166, there is an unusual or unreasonable stipulation the reason for which is not explained, it may well be that in the absence of any explanation, the court will assume that unfair advantage has been taken of the borrower."[58]

His Honour then decided that the clause before him was not unfair and unconscionable, as it involved indexing the amount to be repaid to the exchange rate of the Swiss franc "as a lender of money is entitled to insure that he is repaid the real value of his loan"[59]

Both of the above cases concentrated on the question of the voidability of premiums as collateral advantages. Other cases have, however, concentrated on the penalty aspect of such clauses.

In *Wanner v Caruana*[60], Street CJ considered whether a clause in a mortgage requiring, in the event of default, not only all principal to be immediately repaid but also an amount equal to interest on the unexpired period of the loan. His Honour noted:

> "The lumping together of unaccrued interest, and the imposition upon the mortgagors of the burden of making that payment, appears to me to bear no relationship whatever to the loss which the mortgagees might suffer by reason of the mortgage falling in and the mortgage debt being repaid to them prior to the expiration of the six-year term… The present mortgage has, in this respect, the hallmarks of a stipulation *in terrorem* designed to force the mortgagors to

[56] at p 180-1
[57] [1979] 1 Ch 84
[58] at p 111
[59] at p 111
[60] [1974] 2 NSWLR 301

> adhere to their bargain, and I do not see that this provision has any of the ingredients of a genuine pre-estimate."[61]

In *O'Dea v Allstates Leasing System (WA) Pty Ltd*[62] (a penalty case not involving a mortgage but rather a lease), the High Court cited *Wanner* with approval[63]. Wilson, J identified the crucial question to be asked in penalty cases as follows:

> "In essence the task of the court in such a case is to discern the true intention of the parties: is the clause under challenge a genuine pre-estimate of damage, or is it a penal sanction imposed on the observance of the agreement by the lessee."[64]

In *Guardian Mortgages v Miller*[65] there was a liquidated damages clause charging $15,000 for late discharge. Wood CJ held:

> "In circumstances of a contract which provided for a loan for one month, which attracted a default interest rate of 14.5% for one month, which provided for the mortgagor to pay to the mortgagee, all of the costs and expenses incurred by it as a result of any default, including administrative and legal costs on an indemnity basis, as well as interest upon those costs and expenses…and which also permitted the mortgagee to a charge over any other eal property owned by the Defendant, this provision can only be viewed an unjust penalty."

It might be thought to follow from a fusion of the principles in the above cases that a liquidated damages clause in a mortgage will not be struck down as a penalty or as a collateral advantage provided that it is a genuine pre-estimate of the loss the mortgagee is likely to suffer in the event of default; that a clause which does no more than ensure that a lender receives a rate of interest appropriate to the risk the lender is taking will not be struck down, and neither will a clause that merely seeks to preserve for the lender the value of his loan in real terms; that a clause that imposes an unusual obligation on the borrower that seems penal on its face may well be struck down unless the clause contains an explanation showing it in truth to be a reasonable pre-estimate of loss.

7. Extinguishing the equity of redemption

Extinguishment of the equity of redemption is known as "foreclosure". Under Old System Title, a mortgagee commenced foreclosure proceedings to extinguish the equity of redemption. Foreclosure involved the court giving the mortgagor six months to pay the mortgage debt, in default of which the equity of redemption would be extinguished and the mortgagee could retain the security as owner.

This mortgagee's right has, however, largely been lost under the Torrens System, as now foreclosure can only be applied for under s 61 of the Real Property Act, which requires not only a six month default but also the occurrence of a mortgagee sale that

---

[61] at p 305-6
[62] (1983) 152 CLR 359
[63] at p 371
[64] at p 378
[65] [2004] NSWSC 1236 16 December 2004

has failed due to insufficient money being offered to repay the mortgage debt. Even if the requirements of s 61 are met, however, the Registrar-General retains the discretion to refuse to grant foreclosure but to require a further attempt at sale be made in accordance with the Registrar-General's directions.

8. Redemption where the mortgagee cannot be located

In the event the mortgagee cannot be located, 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 reconvey the land or, where the land is under the provisions of the *Real Property Act 1900* , to execute in respect thereof a discharge referred to in section 65 of that Act, 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 for the time being 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.

I. The right to accounts

1. An equitable remedy

Historically, both equity and common law have provided accounting remedies, but the common law action has now effectively been entirely superseded by the equitable remedy. Equity will provide this remedy when necessary to give effect to an equitable right, or in aid of a common law right.

There are a large number of categories in which equity will order accounts, but most have little or no bearing on loan transactions. Relevantly, however, equity will order accounts when the court considers it too complicated to determine what monies are owed by one person to another without the taking of such accounts (in other words, that the account is too complicated to settle at law). Mutual accounts, where there are receipts and payments on both sides, are one instance where equitable accounting may be considered necessary, and this is usually applicable to a mortgage transaction.

2. The modern procedure

Accounting is most commonly seen in relation to a mortgage transaction in the context of redemption proceedings. Such proceedings arise when the mortgagor wishes to redeem the mortgage and offers to pay out the monies owing, but disputes the discharge figure presented by the mortgagee and refuses to pay it. In such a situation the mortgagor may approach the Supreme Court for an injunction to seek to compel the mortgagee to discharge mortgage. If that suit is brought in circumstances where there is a real dispute as to the amount owing, then this will be resolved by way of taking accounts. In many cases the mortgage will be discharged, with any disputed

monies being paid into court along with additional monies to function, in effect, as security for the mortgagee's costs of the accounting process: see *Project Research Pty Ltd v Permanent Trustee of Australia Ltd*[66].

Accounting is usually conducted by way of an order directing the mortgagee to put on affidavit evidence of the correct state of the accounts, followed by affidavits being prepared on behalf of the mortgagor raising the mortgagor's contentions as to the true state of account. The matter is then placed before a Master for hearing to resolve the differences between the two cases. If the primary area of dispute is legal costs claimed by the mortgagee, the court may instead appoint a costs assessor as a referee and refer the matter to the costs assessor to report as to what legal costs the mortgagee can reasonably claim- this was the procedure adopted by Santow J in *Pangas v Permanent Trustee Australia Ltd*[67].

After a Master has determined the true state of accounts (either with or without the assistance of a referee's report on the subject), consequential orders will be made, such as for monies to be paid out of court in accordance with that determination or for one party to pay the other the net balance owing.

3. Disputes over legal costs

The most common contention when it comes to the taking of accounts are mortgagee's legal costs. Mortgagees can place themselves in a relatively strong position on the question of legal costs by including in the mortgage or the memorandum thereto not only an express provision that costs are recoverable on an indemnity or on a solicitor and own client basis (the two expressions are effectively equivalent for this purpose), but also setting out the rates that will be charged for legal work. The only remaining question then will be whether some costs are not claimable by the mortgagee by reason of the mortgagee having acted improperly in incurring those costs, such as, for example, by mistakenly and/or prematurely commencing legal proceedings.

4. Accounts after discharge

In *Hartl v Cowen*[68], the Queensland Supreme Court looked at the question of when it was appropriate to order accounts after discharge of the mortgage. In that case the mortgagor had paid all the monies demanded by the mortgagee and the mortgage had then been discharged, but the mortgagor claimed that an overpayment had been made. The mortgagor then commenced proceedings for an account with respect to all dealings between the mortgagor and mortgagee. Williams AJ stated:

> "I have not been able to find any case (nor was I referred to any by counsel) where either under the general law or under the Torrens System, a mortgagor was held entitled after redemption to an account in order to determine what amount, if any, was recoverable from the mortgagee as constituting an overpayment. However, there would undoubtedly be situations where it was appropriate to order an account (for example, if fraud was alleged), and I have no doubt that the "mortgagor" after redemption would not be without remedy. But the cases suggest that where the extent of the alleged overpayment is

[66] (1990) 5 BPR 11225
[67] (2000) BC200000879
[68] [1993] 2 QdR 633

known the appropriate remedy is an action for money had and received… Here the plaintiff mortgagor is able to particularise the amounts which he claims were not lawfully payable to the mortgagee pursuant to the terms of the mortgage, and in such a situation it is inappropriate to order that an account be taken. The real question is whether or not those items are recoverable." [69]

Although *Hartl* has been cited as an authority for the proposition that an account is not appropriate after discharge in relation to an overpayment, the case does not in truth support such a general proposition. The principle expounded by *Hartl* is rather that if the alleged overpayment can be particularised without the need of an account to ascertain its quantum, then it is inappropriate to order an account. In *Hartl* the main subject of dispute was whether a "procuration fee" of $1,725 was properly payable to the mortgagee.

J. The right to seek an order that the property be sold

1. Section 103 of the Conveyancing Act

S 103 of the Conveyancing Act materially provides as follows:

(1) Any person entitled to redeem mortgaged property may have an order for sale instead of for redemption in any proceedings instituted by the person ….

(2) In any proceedings, whether for foreclosure, or for redemption, or for sale …the Court, on the request of the mortgagee or person whose land is subject to the charge, or of any person interested …. may direct a sale of the mortgaged or charged property on such terms as to the Court may seem just….

(3) In any proceedings instituted by … a person whose land is subject to a charge … the Court may…. direct the plaintiff to give such security for costs as the Court thinks fit….

(4) … the Court may direct a sale without … determining the priorities of incumbrancees or mortgagees, ….

In *Yarrangah Pty Ltd v National Australia Bank Ltd*[70], Young J held that s103 of the Conveyancing Act was not applicable to Real Property Act land (by reason of s 90 of the Conveyancing Act which limits the application of sections in Part 7 Division 1 of the Conveyancing Act). His Honour considered, however, that there was an inherent power in a Court of Equity to make orders analogous to those provided for in s 103. This proposition has since been confirmed in *Guardian Mortgages v Miller*[71].

Section 103 (and presumably also the inherent power of the court) allows persons including the mortgagor, the mortgagee, and probably also subsequent mortgagees to seek judicial sale of mortgaged land. The court has power to determine the terms of the sale and who is to sell the property.

---

[69] at p 638
[70] (1999) 9 BPR 17,061
[71] [2004] NSWSC 1236

There is no requirement for the court to choose the mortgagee as the court's agent for sale of the security. In *Guardian Mortgages v Miller,* Wood CJ at CL in the course of exercising the court's inherent power to order judicial sale considered "whether, instead of appointing the Plaintiff as the Court's agent for sale, I should appoint an independent receiver" instead of the mortgagee. His Honour, however, rejected the appointment of a receiver in the circumstances that the mortgagor in that case had expressed a preference for the mortgagee as the agent so as to save costs.

The likely wastage of costs by the appointment of a receiver is an important consideration in any case that is likely to dispose a court to favour the appointment of the mortgagee. Further, almost always the mortgage gives a contractual power for the mortgagee to sell the property and hence the mortgagor can raise no objection to that course, and it might further be said that the mortgagee would be compelled to accept less than its contractual rights if forced to act through the medium of a Receiver. It is probably for these reasons that the recent practice of the Supreme Court of NSW in ex parte judicial sale orders sought by equitable mortgagees in default of appearance by the mortgagor has been always to appoint the applicant mortgagee to sell the property rather than any other person. It is possible, however, that the court may depart from this practice in the case of a suit brought by a mortgagor where there is evidence that the mortgagee is likely to sell the property at a lower value than an independent third party.

In *Yarrangah*, Young J noted that exercising the court's inherent power at the behest of the mortgagor to order judicial sale:

> "…is one to be exercised in the special case. It is not to go against the normal procedures of permitting the mortgagee under its statutory or contractual power wide liberty to conduct the sale and, indeed, on analogy with s 103 of the Conveyancing Act, it would seem that where the mortgagee's sale is actively proceeding the equitable power should not ordinarily be exercised."[72]

2. Where there is likely to be a shortfall

Palk v Mortgage Services Funding Plc[73] is an English Court of Appeal case concerning the English equivalent of s 103 of the Conveyancing Act (being s 91of the Law of Property Act 1925). In that case the mortgagee obtained an order for possession of the security property, but as the likely sale price of the land was less than the amount needed to discharge the mortgage the mortgagee proposed to postpone sale of the land in the hope of market prices rising, intending to lease the property on short term leases in the interim. The evidence was, however, that the expected annual rental of the property would be significantly less than the amount of interest that would accrue on the loan per annum. The Court found that although the court had a wide discretion under the section as to whether or not it made orders, that discretion had to be exercised judicially. It was then held that the interests of justice dictated an order for judicial sale, given that there was such a high likelihood of the mortgagor suffering by the postponement that the mortgagee's proposed actions were oppressive to the mortgagor.

---

[72] at p 17,065
[73] [1993] Ch 330

Palk was cited in the Western Australian case of *Sandgate Corp v Ionnou Nominees*[74], a case in which orders were made pursuant to the Western Australian equivalent of s 103 of the Conveyancing Act (s 55 of the Property Law Act 1969, which was found to apply to Torrens Title land in Western Australia, distinguishing *Yarrangah* in this regard) for judicial sale of a vineyard. In that case there were 108 registered mortgagees as well as other persons claiming an equitable interest in the security land, and it was held that the disputes between these persons were such that "utter confusion" reigned and it appeared that years would be required to resolve those disputes. In the circumstance that the vineyard needed ongoing maintenance or else its value would be greatly diminished and in the circumstance that an immediate sale was likely to satisfy the claims of at least all the registered mortgagees, the court exercised its discretion and made the judicial sale orders sought.

In the earlier Western Australian case of *Jones v Evans*[75] (in which the question of the applicability of s 55 of the Property Law Act was sidestepped), the mortgagors sought an order for judicial sale of the security pending the determination of proceedings between the mortgagees and mortgagors concerning the validity of the mortgage, so that new premises could be purchased in lieu of the existing security, with the balance of funds paid into court. The court noted, however, the great differences between the case before it and *Palk*, and dismissed the mortgagor's application, branding it as "totally misconceived".

K. The right to a s57(2)(b) Notice

1. When is a notice required?

We can speak colloquially of the mortgagor having a right to a notice under s57(2)(b) of the Real Property Act before power of sale is exercised. Technically the power of sale does not arise until s57(2)(b) has been complied with. A mortgagee must serve a notice under the section (and to have the notice expire unfulfilled) if the mortgagee wishes to exercise its power of sale or to accelerate repayment of the principal of a loan secured by a mortgage.

2. Non-monetary defaults

The only exception is with respect to defaults not "relating to the payment, in accordance with the terms of the mortgage or charge, of any principal, interest, annuity, rent-charge or other money", as notices in relation to such defaults can be dispensed with pursuant to s 58A of the Real Property Act (and notice dispensing provisions are usually included in mortgages).

The High Court in *Bevham Investments Pty Ltd v Belgot Pty Ltd*[76] considered what was the ambit of the expression "other money" in s 57 (2) for the purpose of considering when a notice was required to be served and in what situations s 58A might operate. The Court found that the expression included any default in respect of the payment of any money under the mortgage, including pecuniary obligations of the mortgagor under the mortgage to third parties such as the obligation to pay rates and

[74] (2000) 22 WAR 172
[75] (1999) BC9908244
[76] (1982) 149 CLR 494

taxes. As Gibbs CJ reasoned with respect to a covenant in the mortgage requiring the payment of rates and taxes[77]:

> "(1) there is a personal covenant by the mortgagor in the mortgage to pay them, which gives the mortgagee a personal remedy which he otherwise lacked; (2) breach of the covenant may result in the whole of the principal and interest becoming payable; and (3) the mortgage enables the mortgagee by paying the rates and taxes to make them effectively principal moneys which are then secured in the "strict" sense of the term on the property."

3. Not required before possession proceedings are commenced

There is no need to serve a s 57(2)(b) notice as a prior to taking possession or commencing proceedings for possession: *Silkdale Pty Ltd v Long Leys Co Pty Ltd*[78].

4. A power of sale having arisen through service of the notice can be waived

A notice validly given may not be withdrawn without the consent of the mortgagor. It may however be waived by conduct on the part of the mortgagee which shows that the mortgagee does not intend to rely on the breach specified in the notice. In *Morton v Suncorp Finance Ltd*[79], Glass, Mahoney and McHugh JJA accepted the principal as stated in *Barns v Queensland National Bank Ltd*[80], that a power of sale, once having arisen, can come to an end because of the conduct of the mortgagee. This principle was cited positively also in *National Mutual Royal Bank v PJ Turnbull*[81].

5. Proper service

A s 57(2)(b) notice must be served in a manner authorised by s170 of the *Conveyancing Act*. It may not be sufficient service of the notice, however, if the mortgagee knows that the mortgagor is not in residence on the mortgaged property when the notice is left there. See *Swervus v Central Mortgage Registry of Australia Pty Ltd*[82].

6. Validity of notices

If the notice is not valid, either due to defective service or invalidity in the text, then the notice is not effective to allow an exercise by the mortgagee of its power of sale or of its contractual powers to accelerate the principal on default.

A notice of default under this section should be construed in the same way as a notice to a lessee pursuant to s. 129 of the Real Property Act: *Mir Bros Projects Pty Ltd v 1924 Pty Ltd*[83]. As the right to sale is considered a very drastic remedy, it is considered essential for the due protection of borrowers that the conditions of its exercise should be strictly complied with. The notice should identify the covenant, agreement or condition in respect of the observance of which the mortgagor is alleged to have made default. A notice which merely incorporates the terms of the section (by demanding that any default be rectified but not particularising the alleged default or

---

[77] at p 359
[78] (1991) 5 BPR 11,512
[79] (1987) 8 NSWLR 325
[80] (1906) 3 CLR 925
[81] by Rogers CJ in SC (NSW), Commercial Division, unreported, 7 March 1990, BC9002672
[82] SC(NSW), Young J, unreported, 17 September 1987, BC8701145
[83] [1980] 2 NSWLR 907

defaults) is insufficient: see *Mediservices International Pty Ltd v Stocks & Realty (Security Finance) Pty Ltd*[84].

The principles enunciated in *Mediservices* were also applied in *Manton v Parabolic Pty Ltd*[85] where Young J considered the issues of notice and stated that sections 57 of the *Real Property Act* and section 111 of the *Conveyancing Act* were virtually identical except that any notice given under section 57 of the *Real Property Act* must specify "that it is a notice pursuant to s 57(2)(b) of the Real Property Act, 1900" (whilst a s 111 notice must refer to s 111). This principle was followed in *Scarel v City Loan & Credit Corp Pty Ltd*[86] which in turn was approved by the NSW Supreme Court in *Silkdale Pty Ltd v Long Leys Co Pty Ltd*[87] and *Websdale v S & JD Investments Pty Ltd*[88].

The notice must specify the default alleged and which is required to be remedied. If money is due, it is not necessarily bad to overstate the amount allegedly due. The issue was considered by Waddell CJ in Eq in *Clare Morris Ltd v Hunter BNZ Finance Ltd*[89]. In that case his Honour cited the decision of the High Court in *Bunbury Foods Pty Ltd v National Bank of Australasia Ltd*[90] where it was said, obiter dicta:

> "Even a notice given to the mortgagor by the mortgagee as a condition precedent of a power of sale is not rendered invalid because it demands payment of more than is due."

Waddell CJ cited also the consideration by the Full Court of the Queensland Supreme Court in *Clarke v Japan Machines (Australia) Pty Ltd*[91] and His Honour citied the comments by Campbell J where Campbell J noted that *"*An error in specification of the appropriate sum will not be the end of the matter…*"*. However, Waddell CJ in *Clare Morris* (supra) was critical that the s. 57 notice in the case before him did not identify whether the amount to be paid was for principal, interest, annuity, rent charge or other money in respect of which the Plaintiff was claimed to have made a default. His Honour also noted that strict compliance with the subsection was necessary as held by the High Court in *Bevham Investments Pty Ltd v Belgot Pty Ltd*[92]. Waddell CJ thus concluded that:

> "..there is a prima facie case that the amount claimed is considerably in excess of that actually due and there is evidence raising a prima facie case of an implied refusal to accept any less. In these circumstances there is, I think, a prima facie case that the s.57 notice is invalid on the ground that the amount claimed is substantially more than that due."

---

[84] [1982] 1 NSWLR 516
[85] (1985) 2 NSWLR 361
[86] (1986) 4 BPR 9226
[87] (1995) 7 BPR 14,414
[88] (1991) 24 NSWLR 573
[89] SC (NSW), unreported, 21 April 1988, BC8802005
[90] (1984) 153 CLR 491 at 504
[91] [1984] 1 QdR 404
[92] (1982) 149 CLR 494 at 501

In *Manton*, Young J stated that "There have been a series of cases dealing with the significance of a misstatement in a notice under s.111 of the amount which needs to be paid by the mortgagor to remedy his default" but referred to *Clarke v Japan Machines (Australia) Pty Ltd* , and said[93] that:

> "All the relevant cases in this State and elsewhere in Australia and New Zealand were reviewed in Clarke's case and the conclusion reached by the Queensland Full Court (at 413) is
>
> > …an error in specification of the appropriate sum will not be the end of the matter. A question of fact and degree is involved in every case. Thee most relevant factors determining validity will be the extent of the error, and the capacity of the notice to give the mortgagor a reasonable opportunity to do what he is obliged to do."

His Honour then noted that a mere typographical error in a notice would not invalidate it, but that as s111 required reference in the notice to the section number (s111 of the Conveyancing Act), a notice failing to make such reference would be invalid. His Honour then ruled as invalid the notice before him on that basis.

In *Bay Marine Pty Ltd v Clayton Properties Pty Ltd*[94], Needham J held that under a similarly worded section, namely s133E(1)(b), it was fatal to even have a typographical error as to the section number. Young J, however, referred to that decision in *Manton* and declined to follow it.

The consequence of such an omission, it was suggested by Young J would not prevent the sale of the property. Section 112(3) provides that if there is a conveyance in professed exercise of the power of sale conferred by the Act, then notwithstanding that due notice was not given, the conveyance shall be valid. Young J suggested that, to his mind, the legislature did not intend to invalidate a sale because of non-compliance with s.111. The purchaser from a mortgage may obtain specific performance where there is no material to suggest that the price is improper of that the purchaser knew of the non-compliance at the time of the contract and where the mortgagor does not seek to set aside the sale[95].

See also *Websdale v S & JD Investments Pty Ltd* (supra) and *Krey v National Australia Bank*[96], where it was held that a notice which overstates the amount due is not invalid if the overstatement is not too great, but that if the notice wrongly claims that the principal is due in the notice, then the notice is invalid. A notice giving one month from its date instead of one month from service was held to be invalid by Brownie J in *State Bank of New South Wales v Topfelt Pty Ltd*[97].

It appears that there is some leeway granted by the Courts in relation to errors made in the notice in relation to such things as the amount due as stated by the mortgagor or other details, such as time for service. Indeed, Brownie J in *State Bank* (supra) held:

---

[93] at p 377
[94] (1984) 3 ACLC 16 at 23
[95] at p 378
[96] (1992) NSW ConvR 55-653
[97] SC (NSW), unreported, 11 March 1993, BC9302006

> "One can find in the books statements to the effect that the words of s57 (and of analogous provisions, such as s111 and s129 of the Conveyancing Act 1919, and of similar provisions in the legislation of other places) are not to be read strictly, but these statements must be read in their contexts, and in the light of the plain legislative objective of giving to mortgagors (or lessees) the opportunity to rectify the relevant breach before the person giving the notice might go on to exercise an extreme remedy…. The notice given by State required Topfelt to pay a specified sum within one month of the date of the notice… but the notice was not served until a few days later, so that it gave Topfelt a shorter period of time than the section permitted, within which Topfelt might remedy its default. It does not seem to me that the decisions going to the validity of a notice claiming an excessive amount, or describing what needs to be done to remedy a default, are precisely to the point involved here, although they shed light on the correct approach."

That approach, His Honour went on to find, was that the shortened amount of time denied the mortgagor the privilege which the legislation gave it, namely a notice giving it a month to obtain and pay over the requisite sum of money. His Honour continued:

> "Whether a mortgagor complies with a statutory notice is a matter going to the very existence to the power of sale Carr v Finance Corp of Australia Ltd[98]; so that a notice purporting to diminish the rights of a mortgagor, as distinct from overstating the amount said to be due or describing in imprecise but understandable terms the breach of the obligation on the part of the mortgagor required to be remedied, is a notice which does not give to the mortgagor the opportunity which the statute requires the mortgagee to give the mortgagor; and hence that notice does not enliven the power of sale."

L. The right to a s111 Notice

S 111 of the Conveyancing Act is of relevance when the mortgage is unregistered, and thus not governed by the provisions of the Real Property Act. Otherwise the principles with respect to such a notice are the same as for the almost identically worded s57 of the Real Property Act.

M. The right to a s92 Notice

1. Nature of the notice

S 92(1) provides as follows:

> "Where the mortgagor has made default in payment of the principal sum at the expiry of the term of the mortgage, or of any period for which it has been renewed or extended, and the mortgagee has accepted interest on the said sum for any period (not being less than three months) after default has been so made, then, so long as the mortgagor performs and observes all covenants expressed or implied in the mortgage, other than the covenant for payment of the principal sum, the mortgagee shall not be entitled to take proceedings to

[98] (1982) 150 CLR 139 at 151

> compel payment of the said 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."

Thus a mortgagee is never obliged to serve a s 92 notice, but if no notice is served then, if the circumstances set out in the subsection apply (being that the term has expired, the mortgagor is not in default save as to failure to repay principal, and the mortgagee has accepted interest for three or more month after expiry of the term) then the mortgagee is precluded from commencing enforcement proceedings with respect to the mortgage, from exercising power of sale, and from taking possession. The notice under s 92 is of three months duration.

2. Failure to serve

If the s 92 is not, in applicable circumstances, served in a valid fashion (being in accordance with the modes of service contained in s 170 of the Conveyancing Act and/or in the mortgage), or is invalid by reason of an error in the notice, the notice will be ineffective, and the mortgagee will be precluded from commencing or sustaining enforcement proceedings, from exercising power of sale, or from taking possession, until a new notice is served and the three month period of that notice has run its course.

There is a scarcity of good cases on the operation of s 92 as there have been few cases in this state bearing on the section, and the New Zealand equivalents to the section which have been judicially commented upon are significantly different in their drafting so as to render the New Zealand cases of little usefulness. The only case of direct applicability to the question of the validity of s 92 notices is the decision of Master Harrison in *JE & EJ Investments Pty Ltd v Masselos* (2002) NSW ConvR 58,213.

In that case the learned Master considered whether a notice expressed to be under s 57(2)(b) of the Real Property Act and s 111(2)(b) of the Conveyancing Act (but not referring to s 92 of the Conveyancing Act) and providing 3 months for the repayment of the outstanding principal sum could constitute a valid notice under s 92. The notice in question was drafted in accordance with the requirements of s 57 and s 111 in that it specified that if there was default in compliance with the notice the mortgagees "propose to exercise their Power of Sale" with respect to the security.

In her decision, the Master cites the New Zealand cases, only to dismiss them as being of little assistance. The Master then proceeded to contrast the s 57/s 111 language of the notices with the language referred to in s 92, commenting that the notice did not include any reference to the fact that the mortgagee "intends to take legal proceedings" but only to the proposed exercise of the power of sale. On that basis, the Master concluded that the notice did not fulfil the requirements of s 92 and was thus not a valid notice.