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**TOPIC: RIGHTS AND OBLIGATIONS OF A MORTGAGEE IN
POSSESSION OF REAL PROPERTY**

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INTRODUCTION

A mortgage, in its simplest form, is a means by which a mortgagor provides his real property as security in favour of a mortgagee, in return for an advance of money. All mortgages provide for the repayment of the advance either by installments or by interest payments and a lump sum at the conclusion of the term. If the mortgagor defaults in the payment of any monies secured by the mortgage, the mortgage permits the mortgagee to enter into possession of the property and provides the mortgagee with a power of sale¹.

Usually when a borrower defaults on a mortgage, the reaction of the mortgagee lender in almost every situation is to take possession of the mortgaged property with a view to realise its security. This is common since many defaulting borrowers may not have any other assets against which the lender can enforce the personal covenants in the mortgage therefore a sale of the mortgaged property is normally the only way in which a lender will recoup all or any of its advance. Obtaining possession is necessary to either effect a sale or to recover the sum advanced with interest².

The purpose of this paper is to discuss the rights and obligations of a Mortgagee in possession of real property with particular reference to landed property.

According to Professor I.O. Smith in his book Secured Credit in Global Economy: Challenges and Prospects a mortgage involves the transfer of ownership in an asset to a creditor (mortgagee) by way of security for borrowing upon the condition that upon the full discharge of the debtor's

¹ See, Mohammed V. Abdulkadir (2008) 4 NWLR (Pt.1076) p.111

² Olori Motors Co. Ltd V. U.B.N Plc. (2006) 10 NWLR (Pt.989) p.586

obligation, there would be a re-transfer of the mortgaged asset to the mortgagor³.

A mortgage has also be described as an interest in property created as a security for a loan or payment of the debt and terminated on payment of the debt. Basically, there are two types of mortgage, legal and equitable. A legal mortgage confers a legal estate on the mortgagee⁴.

In the common law, Real and Personal property are the main classification of property. Real property refers to immovable e.g. land and things attached thereon while personal property are generally movables.

Brief History of Laws of Mortgagee Possession

The laws of mortgagee possession developed through equity's struggle to balance the rights of mortgagees and mortgagors. Ironically many equitable rules themselves became the source of inequity. Subsequently, as the Chancery Courts sought to avoid, rather than remove, these entrenched rules, the balance tilted back and forth.

Under common law, mortgagees, as legal title-holders, could take possession of mortgaged land immediately any loan is secured by mortgage of real property⁵, without notice⁶, and without default by the mortgagor⁷.

Despite the potential for injustice, the Chancery Courts would, "... never interfere to prevent the mortgagee from taking possession⁸.

³ **Prof. I.O. Smith, Secured Credit in Global Economy; Challenges and Prospects.**

⁴ See Law and Property Act of 1925, which covers mortgage regulations in the UK.

⁵ Harman L.J. in *Four maids Ltd V Dudley Marshall (Properties) Ltd* (1957) 1 CH. 317, 320; see also, *Birch v Wright* (1786) 1 TR 378, 383 Per Buller J.

⁶ *Doe d Fisher v Giles* (1829) 5 Bing 421

⁷ *Doe d Roylance v Lightfoot* (1841) 8 M & W 5553; *Green V Burns* (1879) 6 L R Ir 173.

⁸ *Marquis of Cholmondeley V Lord Clinton* (1817) 2 Mer 171, 359 per Sir William Grant; *London Permanent Benefit Building Society V De Baer* (1968) 1 ALL ER 372.

This hesitancy unexplained, equity instead evolved the solution of holding mortgagees in possession to high standards of behavior, requiring them to answer not only for the land's actual income, but also for what might have been obtained but for their willful default.

The Mortgagee cannot be restrained from going into possession of the mortgage property unless such right has been contracted out by himself and such cannot commit trespass therein⁹. Where physical possession will not be possible due to existence of leases which were created prior to the mortgage agreement, he can notify them to pay rents to him. In **Horlock v Smith**¹⁰ it was held that where physical possession by the mortgagee is not possible due to the existence of leases binding on him, he can enter into receipt of rent and profits by notifying the lessees in possession to pay rent to him as opposed to the mortgagor.

Where the tenants refused to pay rents to him, he may bring an action to eject them and he is also entitled to recover mesne profit¹¹.

WHEN A MORTGAGEE IS DEEMED TO BE IN POSSESSION

As a mortgagee in actual possession assumes many of the liabilities of the mortgagor, it is important to ascertain when the taking of possession actually occurs and from what time the mortgagee might be so chargeable. As decided in **Suberu V. A.I.S.L. Ltd**¹² the debt being secured and the condition for the loan therein need to be stated. That is the circumstance, character and value of the property and the normal mode of its use.

These facts combined with conduct consistent with a proprietor who might have due regard to self interest in the preservation, maintenance

⁹ see *Awojugbagbe Light Industries Ltd vs. Chinukwe* (1995) 4 NWLR part 390 pg 379.

¹⁰ (1895) 1 Ch. D 516

¹¹ Recovery of premises Act

¹²(2007) 10 N.W.L.R (Pt.1043) p.530

and care of the property will be an indicator of taking possession. In **Lord advocate v Lovat**¹³ where a mortgagor made no payment of either principal or interest and severed all connection with the property over a period of 20 years. The property was unsuitable, waste land without value. The mortgagee had, for that period performs the only act of possession possible in respect of that land by paying with the mortgagor's acquiescence, all the land tax charged on it. It was found that the mortgagee had entered into possession and the mortgagor had abandoned his claim to redemption¹⁴.

Whether or not the mortgagee has entered into possession may be judged by whether or not the mortgagee has taken control and management of the property on itself and put an end to any similar right the mortgagor enjoyed, particularly conducting dealings with tenants.

A mortgagee will not be held to be in possession by simply receiving the rents and profits. The mortgagee must be seen to have terminated the power of the mortgagor to manage the property such that rents received by the mortgagee are part of the management process¹⁵.

Entry into a tenancy agreement with another person, other than the mortgagor, would be primary evidence that the mortgagee is in actual possession. If there were any doubt in it, the date of that agreement would be deemed to be the date of taking possession¹⁶.

Once the date of possession is ascertain, the period of liability of the mortgagee commences. For example, from that time the mortgagee will be liable to account for receipt of the rents¹⁷.

¹³ See **Lord advocate v Lord Lovat (1886) 5 App cas 273 at 288** for example see **Kirby v Cowdroy (1912) AC 599**

¹⁴ See 41 *ibid* at 603.

¹⁵ See **NOYES v Pollock (1886) 32 ChD 53 at 61**.

¹⁶ See **Mexborough Urban district Council v Harrison (1964) 2 All ER 109 at 111**.

¹⁷ See 44 **Gaskell v Gosling (1896) QB 609 at 691**.

The mortgagee would also have the right to exercise all powers conferred by the mortgage and all powers implied by statutory provisions¹⁸ given to a mortgagee in possession. As a mortgagee may be deemed to be in possession without taking actual possession, a court must carefully examine the acts of a mortgagee to determine whether possession has been taken in law and whether liability flows¹⁹.

A mortgagee takes possession

- (a) When he deprives the mortgagor control and management of the mortgaged property. If the mortgagor or a tenant under a lease from the mortgagor, mortgage the mortgaged property, the mortgagee, if he is entitled to possession, may take possession by ejecting the occupant.

- (b) If the occupant is a tenant lease which is paramount to the mortgage, the mortgagee may be entitled to possession as between himself and the mortgagor, possession by requiring the tenant to pay the rents and profits to the mortgagee or his agent instead of paying them to the mortgagor.

- (c) The mere fact that the mortgagee intercepts the rents and profits being paid by the tenants to the mortgagor's agent does not take the mortgage property out of the mortgagor's control.

If a mortgagee, enters into possession and profits in another character, he cannot be charged as a mortgagee in possession. The receipt of the

¹⁸ See Conveyancing Act 1919 (NSW) S. 109, 110, Property Law Act 1936 (SA) s. 47 Property Law Act 1958 (Vic) s. 101 (does not apply to registered land in Victoria s. 86) Conveyancing s. 21; Property Law Act 1969 (WA) s. 57)

¹⁹ See In Elders Rural Finance Ltd v West Pac Banking Corporation (1990) 5 BPR 97407

rents and profits by the particular mortgagee in possession must be distinctly established.

A person who purchases a property from a mortgagee and goes into possession himself to be the owner, if it afterwards appears that he is not with that character, but only holds a lien on the property by virtue of the money advanced by him on the supposed purchase, cannot then be treated as in possession as to make him liable to render accounts as an ordinary possession. It is essential to the creation of such liability that he know that he was in possession as mortgagee.

So where a mortgagee acted as owner after final order of foreclosure regularly obtained, and the foreclosure was afterwards opened the exercise of its equitable jurisdiction, it was held that prior to the exercise of the foreclosure the mortgagee was not chargeable as a mortgagee in possession as owner he was under no obligation to repair the buildings or to obtain tenants.

The appointment of receiver by a mortgagee other than under statutory or express appointment of a receiver will constitute the mortgagee a mortgagee in possession²⁰.

RIGHT TO ENTER POSSESSION

Under any old system of mortgage, as the mortgagee was the holder of legal estate there was a general acknowledged right to take possession of the mortgaged property, irrespective of the default on the part of the mortgagor²¹.

²⁰ See *Parkinson v. Hanbury* 1867 L.R. 2 H.L. 18 R.C. 411

²¹ *Four Maids Ltd v Dudley Marshal Property Ltd* supra.

A legal mortgagee's right to possession which is a common law right is an incident of the legal estate in the land. It can only be expressly abrogated or restricted. However, in practice, it was argued, that under the old system of mortgage, a mortgagee's right to enter possession was impliedly excluded so long as the mortgagor observed the terms of the mortgage and gave the mortgagee no basis for seeking to enforce the security²².

Nevertheless, a mortgagee always had the right to exercise a right of entry to protect the security²³.

If, for example, the mortgagee wish to take possession to protect the place from vandalism for the purpose of carrying out repairs or to prevent waste. Such provision is not repugnant to the concept of the mortgage²⁴.

In the United Kingdom, though in theory the mortgagee always has the right to take possession of mortgaged property even if there has been no default in installments, where residential property is concerned the court has the power to delay the recovery of possession if there is a realistic possibility that the default will be remedied in a reasonable time. In the case of default the mortgagee has a statutory right to sell the property but will normally be exercised after obtaining possession.

Under the Torrens system²⁵, where a mortgage is only a charge on the land, the mortgagor, as registered proprietor, retains the legal estate and consequently, all the incidents of that legal estate. One of these incidents is the right to possession. It is not uncommon for a mortgagor to attorn the mortgagee with the installments of interest being deemed to

²² *Esso Petroleum Co Ltd v Altonbridge Properties Ltd* (1975) 1WLR 1474 at 1483, 1484 APPLIED IN *Eqws Corp Pty Ltd v Rigert* (2003) V SC 343

²³ *Ex parte Wickens* (1898) 1 qb 543 at 547, 549

²⁴ *Western Bank Ltd v Schindler* (1977) Ch 1 at 10.

²⁵ This is applicable to the British and commonwealth countries

be rent. The failure to pay installments or interest would be similarly treated as a failure to pay rent and a breach of that implied tenancy by estoppels. This would set in train the various procedures necessary to evict the mortgagor to enable the mortgagee to enter into possession. The mortgagor's right under the Torrens system to possession is somewhat nebulous under the old system.

Effectively, therefore, a registered mortgagee, being only a statutory charge, has no right under the system of registered land in holding to enter possession of the security until default. The default envisaged is not only default in payment of principal and interest, but default generally in respect of any condition of the mortgage instrument. The provision possession by receiving the rents and profits, as opposed to actual possession, is to account for the situation where there is a lessee in possession with the consent of the mortgagee. It seems improbable that a mortgagee, who had given consent to the lessee to enter possession for the duration of the lease, would be in a position to take action against the lessee to obtain actual possession as, presumably the consent to the lease would have the effect of waiving the mortgagee's right to actual possession until the expiry of the lease²⁶.

The right to possession in the event of default may also be exercised by a second registered mortgagee, provided appropriate arrangements are made with the first mortgagee²⁷.

RIGHTS OF A MORTGAGEE IN POSSESSION OF REAL PROPERTY

²⁶ cf Lysmar Ltd No. 2 (1936) NZLR 541 at 544 followed in WG Geoz and Sons Ltd v Essanda Finance Corporation Ltd (2000) V Conv Rq 54-623.

²⁷ See Australia & New Zealand Bank Ltd v Hathaway (157) QWN 49; King Investment solutions Pty Ltd v Hussain (2006) ANZ Conv R 48

In all the jurisdictions, a mortgagee who takes over possession of a real property pursuant to a Deed of mortgage can exercise various rights over the mortgage property whilst he retains possession²⁸.

These rights of possession and sale are based in statute, in England it is based on the Transfer of Land Act²⁹. Though the Act sets out the duration of notices required to be served, the terms of the mortgage may provide for a shorter period of notice. Accordingly, it is essential to always read the terms of the mortgage to ensure that the proper time spans for notices have been given³⁰.

Power to Create Leases

At common law, the mortgagor has no power to grant leases binding on the mortgagee over the demised premises since he has no title to possession having conveyed same to the mortgagee. The mortgagee on his own part has power to grant lease binding on the mortgagor before redemption only. Incident to every mortgage is the right to redeem, a right which is called the mortgagee's equity of redemption, and which continues notwithstanding that he fails to pay the debt in accordance with the proviso for redemption. This right arises from the transaction being considered a mere loan of money secured by a pledge of the estate³¹. The result is that it was difficult to create an indefeasible lease without the concurrence of both parties.

However, since 1881 statutory provisions have made it possible for indefeasible leases to be created by either of the parties in possession. Provided the mortgage agreement does not narrow down the statutory powers of leasing, leases may be created to bind all persons as follow:

²⁸ Section 19 (1)(iii) Conveyancing Act 1881 and Section 123 Property and Conveyancing Law Cap. 100 Laws of Western Region of Nigeria, 1959

²⁹ Transfer of Land Act 1958

³⁰ See Y.Y.D. Dadem, Property Law Practice in Nigeria, (2009, Yaliam Press Ltd, Abuja) p.143

³¹ Ndaba (Nig. Ltd V. U.B.N. Plc (2007) 9 NWLR (Pt.1040) p.439

(i) Agricultural or occupational lease not exceeding 21 years³²

In Nigeria this type of lease could be created by either person in possession only outside the Property and Conveyancing Law (PCL) States (i.e in the Eastern, Northern and Lagos states)

(ii) Building leases for any term not exceeding 99 years³³ This type of lease may be created by either party in any state of Nigeria.

Though in order for the said leases to be valid, it must satisfy the following requirements:

- (a) Must be limited to take effect in possession not later than 12 months after its date;
- (b) Reserve the best rent reasonably obtainable ;
- (c) Contain covenant for payment of rents and condition for re-entry upon the rent not being paid within thirty days;
- (d) Contain covenant in the case of a building lease that improvements will be made by the lessee in connection with buildings, repairs to buildings or buildings purposes;
- (e) Counter part of the lease executed by the lessee and delivered to the lessor and where the grantor of the lease is the mortgagor, deliver to the mortgagee within one month first in priority and counterpart of the lease duly executed by the lessee

Thought a lease created by the mortgagor which does not comply with the statutory provisions remain valid between the mortgagor and the lessee, but it is not binding on the mortgagee at common law. Under the various Recovery of Premises Laws and Rent Control and Recovery of

³² S. 18 Conveyancing Act 1881 (Note all the details regarding creation of leases in Nigeria and the various recovery of premises laws were gotten from Nigeria Law of Secured Credit by Prof. I.O. Smith 18 Conveyancing Act 1881)

³³ see 121 PCL cap 100 LWN 1959

Residential Premises Laws of the various states of Nigeria³⁴ the mortgagee cannot treat a tenant or any other person in lawful occupation of premises as a trespasser on the ground that he is not bound by the contract of tenancy at common law³⁵.

Such tenant or lawful occupant is a statutory tenant, retains possession by virtue of the provisions of statute, and can only be turned out after strict compliance with the requirements of the statute as against the general law³⁶.

Notwithstanding the statutory provision, it appears that in Rivers and Kaduna States, the Landlord and Tenant Edicts applicable prohibit the mortgagee from creating "a tenancy of the mortgage property and unless until he has foreclosed the mortgage"³⁷.

The Edicts however apply to residential premises mainly³⁸ so that the mortgagees in those states can create agricultural or building leases without exercising a right of foreclosure provided that they are in possession of the mortgaged property.

The mortgagee, may where the mortgage debt becomes due and unpaid, give notice of the mortgage to the tenant and demand that thereafter all rents and profits be paid to him or as directed by him³⁹.

Similarly, in the United Kingdom, by virtue of section 99 (1) (2)⁴⁰, either parties while in possession can also create agricultural or occupation

³⁴ see Nigerian Law of secured Credit by Professor I.O. Smith for example the Rent Control and Recovery of Residential Premises Edict No. 6 of Lagos State, 1997

³⁵ See Nigerian Law of secured credit by I.O. smith (Any person in lawful occupation of premises is a tenant under statute: see Rent Control and Recovery of Residential Premises Edict No. 6 of Lagos State)

³⁶ See African Petroleum Co. Ltd v Owoduni (1991) 8 NWLR Part 210 page 139

³⁷ see Edict No. 4 Rivers State 1988 and Edict No. 17 Kaduna 1990

³⁸ See Edict No. 4 Rivers State 1998 Section. 1 (4) Edict No 17 Kaduna State 1990 s. 5 (4)

³⁹ See Edict No 4 Rivers State 1988 s. 16 (3) (f) edict No. 17, Kaduna state 1990 s. 20 (3) (f)

⁴⁰ Law and Property Act of 1925

leases for any term not exceeding twenty-one years, or, in the case of a mortgage made after the commencement of the Act, fifty years;

The mortgagee can also make building leases for any term not exceeding ninety-nine years such lease shall be made to take effect in possession not later than twelve months after its date.

In New Zealand, Section 91 (1)⁴¹ also empowers a mortgagee in possession to create new tenancies, although he is limited to granting leases of seven years or less..

A mortgagee in possession can also carry out Improvements which will enhance the value of the property and he is entitled to reimbursement from the mortgagor for the improvement. This is borne out of his obligation to keep the mortgaged property in a state of repairs. In ***Nigeria Loans & Mortgage Company Ltd v Ajetomobi***⁴², where the mortgagee took a loan from the Plaintiff to complete his house and mortgaged the property to the Plaintiff as security, the mortgagor did not expend the money for the purpose meant and the mortgagee took possession and completed the building. In an action to recover the debt and the sum expended, the court held that the improvements were not only reasonable and proper, but up to a point were necessary to prevent deterioration in the potential value of the property, and as a result the sum expended was recoverable.

He may sue for trespass committed on the property even before his entry into possession. In ***Ocean Accident & Guarantee Corporation v***

⁴¹ of the Property Law Act 2007

⁴² (1944) 17 NLR P 136

Illoford Gas⁴³ it was held that though the mortgagee was not in possession when the property was damaged by flooding caused by the defendants, they were entitled to bring an action in damages as their right of action dates back to the date of the execution of the mortgage.

Can institute an action to restrain either the mortgagor or third parties from causing damage or encroachment prejudicial to his interest on the mortgage property. In **Legg v Mathieson**⁴⁴ It was held that though the defendants had been awarded ownership of the railways, it formed part of the subject of the mortgage and the mortgagee was entitled to protect his security.

A mortgagee in possession is entitled to take the rents and profits by virtue of legal ownership or equitable interest which the mortgage confers upon him. However, the rents received by the mortgagee are applicable in the first instance to the payment of the outgoings, such as rents, rates, tax, insurance premiums, the interest on prior encumbrances the balance is then applicable, firstly, in payment of interest on the property and on expenses of improvements and other expenses which is entitled to add to the mortgage debt. In **Bompas v King**⁴⁵ it was held that where it is found that the mortgagee in possession on taking his accounts has suffered a loss by reason of the rents not being sufficient to pay the expenses of management, he is entitled to be allowed out of the proceeds of the sale of the property what he has lost.

In New Zealand, by virtue of s. 91 (11)⁴⁶, a mortgagee in possession is entitled to sue upon the covenants of every lease affecting the said land or any part thereof, and can exercise all rights, powers and remedies of

⁴³ 1905 2 KB PG 493

⁴⁴ 66 ER P 31

⁴⁵ (1886) 33 Ch. D 279

⁴⁶ of the Property Law Act 1952

the lessor under the said lease in all respect as though the reversion of the said land were for the time being vested at law in the mortgagee.

A mortgagee taking possession of land is entitled as against the mortgagor to all growing crops and all produce of the land, and if possession be lawfully demanded by the mortgagee any person refusing possession may be restrained from cutting or removing the crops. In **Bagnall v Villar**⁴⁷ it was held that the continued possession of the mortgagor after possession was demanded by the mortgagee was a wrongful withholding of possession from the mortgagee, and that the mortgagee had a right to restrain the mortgagor or his agent from the continued cutting of growing crops on the land and can sue for damages.

If the property covered by the mortgage includes a business carried on upon the mortgaged premises, the mortgagee is entitled to carry on the mortgagor's business for a reasonable time and to use the name of the mortgagor for that purpose so that the property may be sold as a going concern.

A mortgagee in possession can also collect income by logging trees,⁴⁸ or harvesting crops but can only claim those crops harvested after possession was taken⁴⁹. He has no power to embark on risky ventures. See **Hughes v Williams**⁵⁰, where a mortgagee in possession could not claim from the mortgagor the costs of opening a slate quarry.

⁴⁷ (1879) 32 Ch. D at page 61

⁴⁸ (see s. 95 PLA 1952)

⁴⁹ (See *Corbett v Agnew* (1930) NZLR 1033 SC; *Bagnall v Villar* (1879) 12 Ch D 812., *Re Phillips* (1880) 16 Ch D 104 (CA))

⁵⁰ (1806) 12 Ves Jun 494

He can adopt the mortgagor's existing contracts. Adoption in this sense requires more than acquiescence: "an innovation or renegotiation is required"⁵¹.

A mortgagee in possession can also enter new contracts concerning the mortgaged property if "necessary or incidental to the exercise of his power. And can also enter self-interested transactions. In **White v City of London Brewery Co**⁵² where a mortgagee in possession leased the mortgaged property subject to the purchaser agreeing to buy beer exclusively from the mortgagee, who was a brewer. The resulting profits were held to belong to the mortgagee's business, not to the mortgagor's hereditaments, and so the mortgagee could keep them. However, Cotton LJ. Stated that the mortgagor could only recover the extra rent that would have been made had the property been let without the restrictive covenant.

Can repair and maintain the mortgaged property. For mortgagees in possession, maintenance of the property out of income received is actually a duty⁵³. Where the property is not yet income yielding before a mortgagee takes possession he is entitled to be reimbursed for reasonable expenses incurred while in possession. Equity permits him to deduct all payments made for rates, repairs and the cost of recovery the rent.

The mortgagee may charge only to the extent of reasonable improvements which enhances the value of the property but not excessive which would prevent the mortgagor to redeem. Where the mortgagee carries out extensive improvements not envisaged by the

⁵¹ See The Laws of New Zealand (Butterworth, Wellington, 1996, vol 22, receivers para 1,3 LNZ Receivers" para 43, 50.

⁵² (1889) 42 ChD 237.

⁵³ see RICHARDS V MORGAN (1753) 4 Y & C Ex 570; LEECH V NATIONAL BANK OF NEW ZEALAND (1996) 3 NZLR 707, 713 per Paterson J (HC).

mortgagor, he is said to have “ improved the mortgage out of his estate” and cannot be reimbursed by the mortgagor⁵⁴.

A mortgagee in possession is not obliged to give notice to the mortgagor before he executes the repair or improvement. All that need to be proved is that the improvement is a reasonable one and produces a benefit to the property.

The local case under which the mortgagee may be entitled to reimbursement for improvement is the ***Nigerian Loan and Mortgage Co. Ltd v. Ajetunmobi***⁵⁵.

A Mortgagee in possession can insure and protect the property from Vandals⁵⁶.

Can sue third parties in contract or tort. ***Trust bank Ltd v Lockwood Buildings Ltd***⁵⁷ per Holland J (HC), where it was stated that a mortgagee in possession can sue for trespass and conversion. The decision was also affirmed in ***Lockwood Buildings v Trust Bank***⁵⁸

He can access all “books, documents and information” in the mortgagor’s possession relating to the mortgaged property⁵⁹. In ***Richmond Equities Ltd v Interfauna Trading Co (NZ) Ltd***⁶⁰ this right was extended to documents containing confidentiality clauses.

Freedom from interference: Mortgagors cannot impeach the decisions of mortgagees in possession just because they, or even the court, would have acted differently. The choice between alternative courses is for the

⁵⁴ SANDON v HOOPER 49 ER P 20

⁵⁵ supra

⁵⁶ Western Bank Ltd v Schindler (1976) 2 All ER 393, 396 PER BUCKLEY LJ (CA).

⁵⁷ (1994) 1 NZLR 666, 674-677

⁵⁸ (1995) INZLR 22 (CA).

⁵⁹ See s. 104 FF Property Law Act 1952 (2007) of New Zealand,

⁶⁰ (1988) 4 NZCLC 64 (HC)

secured creditor and for them alone as supported by the decision in **Re Neo Signs (Australasia) Ltd**⁶¹

A mortgagee in possession has right to seek for an injunction to restrain third parties interfering with his possession. The main exceptions are prior mortgagees, who by taking possession or appointing a receiver themselves can suspend the tenure of a mortgagee in possession operating under a junior security. It is only the Courts that are statutorily empowered to terminate or limit possession if circumstances no longer justify its continuation⁶². Power to repudiate existing contracts: Mortgagee in possession can cancel the mortgagor's existing contracts with third parties, with the third party's claim for damages ranking behind the mortgagee's claim as decided in **Quik Bake Products LTD V New Zealand Baking Trade Employees Industrial Union of Workers**⁶³. However, the right of the mortgagee to repudiate residential tenancies is limited by Statute⁶⁴.

Right to ignore a corporate mortgagor's constitution: Mortgagees in possession are not bound by the dictates of a corporate mortgagor's constitution. But authority to the contrary is **Re Emmadart Ltd**⁶⁵.

Right to vacant possession: Mortgagee in possession can require the removal of any chattels from the land as supported by **Norwich Union Insurance Society v Preston**⁶⁶ and after taking physical possession can treat the mortgagor's chattels as those of a trespasser, with no obligation to care for them. See also the decision in **Jones v Foley**⁶⁷

⁶¹ (1965) VR 125, 127 per Adam J (Vic: SC).

⁶² See s. 104 PP Property Law Act 2007 of New Zealand.

⁶³ (1990) 5 NZCLC 66, 701 (AC).

⁶⁴ For example s. 58 Residential Tenancies Act 1986 of New Zealand and the various Recovery of Residential Premises Laws applicable in Nigeria.

⁶⁵ (1979) ALL ER 599

⁶⁶ (1957) E ALL ER 428

⁶⁷ (1891) 1 QB 730, 732 per Daly J. see generally ELG TYLER (ed) Fisher & Lightwood's Law of mortgage (10 ed, Butterworths, London, 1988) 351-352.

Advantage of entering into possession: entering into possession allows mortgagees to exert direct control over the land's management.

Disadvantages of possession are that the mortgagees are not able to bill mortgagors for the time spent in possession, and cannot insulate themselves from liability by seeking judicial guidance on legally questionable decisions.

OBLIGATIONS OF A MORTGAGEE IN POSSESSION OF REAL PROPERTY

The fundamental duty for mortgagee in possession is the equitable duty of good faith as described in **Downsview Nominees Ltd v First City Corporation**⁶⁸. These duties are enforced primarily by courts awarding damages or issuing preventive injunctions⁶⁹.

Taking Possession: Mortgagee's Beware

When a borrower persistently defaults on a mortgage, the response of the mortgagee in almost every situation is to take possession of the mortgaged property with a view to realising its security. This is hardly surprising. Very few defaulting borrowers will have any other assets against which the lender can enforce the personal covenants in the mortgage and a sale of the mortgaged property is normally the only way in which a lender will recoup all or any of its advance. Obtaining possession is normally a practical requisite of effecting a sale, although the two steps are distinct and flow from separate rights in law.

⁶⁸ (1993) 1 NNNZLR 513 (PC) (DOWNSVIEW).

⁶⁹ For a decision of the possible grounds for awarding an injunction, see New Zealand Commentary on Halsbury's Laws of England (4 ed, Butterworths, 1989) binder E, Mortgage, para C725, 56; George Hinde and Donald McMorland Land in New Zealand (1 ed, Butterworths, Wellington, 1997), para 8. 132, 749-752.

It is basic element of law of mortgages that a mortgagee is entitled to possession, “before the ink is dry on the mortgage” (as one judge famously remarked). This right exists even when there has been no default on payment and harks back to the historical nature of the mortgagee’s estate in the property, being one of theoretical possession from the outset. The modern reality, however, is that a mortgagee will only be able to obtain possession in cases of default. This will normally be made clear in the mortgage deed. In England in cases of residential property, the mortgagee’s right to possession is restricted further by the court’s statutory powers to adjourn, stay or suspend possession proceedings under s.36⁷⁰ and s.8⁷¹.

Whilst the taking of possession is usually a necessity for lenders if they are to effect a sale of the property and make any recovery, it is not without its risks. As soon as a mortgagee obtains possession, whether by means of a court order or by peaceable re-entry, a mortgagee not only obtains rights over the property, it also comes under a variety of legal duties towards the mortgagor. Normally, a mortgagee will try and make a quick sale. However, this is not always possible⁷². Even in everyday cases, there will be a period when the mortgagee is in possession of the property for a period of time prior to sale. In the case of buy-to-let mortgages, the mortgagee will often take subject to an authorised tenancy. In a lot of cases, these tenancies will have a term to run, sometimes for a year or more. Provided the tenant does not default on rent payments, the mortgagee will either have to sell with the tenant *in situ* or let the tenancy run before it can obtain vacant possession. It is

⁷⁰ of the Administration of Justice Act 1970

⁷¹ of the Administration of Justice Act 1973.

⁷² See U.B.N Plc V. Ayodare & bSons (Nig) Ltd (2007) 13 N.W.L.R. (Pt.1052) p.567

during this period that the mortgagee has to be particularly live to the obligations and duties it still owes towards the mortgagor:

A duty to account strictly to the mortgagor.

One of the basic obligations of a mortgagee in possession is to account to the mortgagor on the basis of “wilful default”. When a mortgagee takes possession, the mortgagor’s beneficial interest in the property is not lost. The mortgagee must account for any surplus achieved on a sale and for income earned when in possession. If a mortgagee takes possession subject to a tenancy, such as in a buy-to let situation, it must account for the rents and other income derived. Indeed, a mortgagee must not only account for what it actually receives, but for what it ought to have received, had it managed the property with due diligence. For example if a mortgagee takes no steps to collect rents from a buy-to-let tenant, it will have to account for the rent that it should have collected. Reasonable care must be taken to maximise a return on the property. However, this duty is not too strict. A mortgagee is not obliged to speculate with the property or make “special exertions” to get the highest possible rent. Nor, in most cases, will a mortgagee be obliged to let the property pending a disposal because this will often interfere with a sale.

Liability for waste

It will come as no great surprise that a mortgagee cannot commit acts of waste on the property by damaging or destroying it. However, obligations in relation to the fabric of the property can go further-

Liability for repairs.

A mortgagee in possession is under an obligation to maintain the property and keep it in good repair. However, at common law this

obligation is limited to the extent that the rents and profits from the property allow the mortgagee to do so. It is not obliged to spend its own money on substantial repairs, although if essential minor repairs are needed to prevent the property suffering serious damage or, in the case of leasehold property, avoid forfeiture, such work should be undertaken, even at the mortgagee's expense.

Liability under leasehold covenants.

The liability to repair, may arise in a different way if a mortgagee takes subject to a tenancy. In that event, a mortgagee will be liable to the tenant on any covenants contained in the tenancy agreement. For tenancies created after 1st January 1996, this obligation derives from s.15(2) of the Landlord and Tenant (Covenants) Act 1995. For earlier tenancies, the common law obligation is similar, provided the subject matter of the covenant relates to the mortgaged land. The liability keep premises in good repair would be one such obligation.

Leasehold enfranchisement.

If a mortgagee goes into possession of property which is the subject of a long leasehold with rights of enfranchisement, a tenant will be able to serve relevant notices on the mortgagee and the mortgagee may be obliged to participate in court proceedings as if it were the landlord⁷³.

Few of the obligations imposed on mortgagees in possession are so onerous as to make them difficult to comply with. However, the unwary mortgagee can be caught out if it is unaware of what those obligations are. Lenders would be well advised not only to investigate potential

⁷³ See, *Ayinke Stores Ltd V. Adebogun* (2008) 10 NWLR (PT.1096) P. 612 on procedure for recovery of premises.

liabilities, but also to think through the consequences of taking possession in cases where a quick sale may not be achieved.

Remedies Of Mortgagee In Possession

In event of failure to pay the loan when due or any other default, the mortgagee has numerous remedies in respect to the property pledged by the mortgage.

The mortgagee may, with the consent of the mortgagor, take possession of the mortgaged property. He is then known as a "mortgagee in possession." This gives him no greater legal title to the property than he had under the mortgage; it merely entitles him to collect the benefits of the property. His possessory right ceases as soon as he has been paid either from the revenue out of the property or by the mortgagor. This form of remedy is seldom utilized by the mortgagee as he must account for all receipts from the property and years may pass before he has collected the amount of his claim.

Advantages and disadvantages

Advantages and disadvantages of a lender being a mortgagee in possession as opposed to appointing an LPA receiver when enforcing a legal charge over property in England and Wales

The right for a mortgagee to enter into possession of a property in certain circumstances is a right which arises under common law. A lender, on becoming mortgagee in possession of a property, will assume liabilities and responsibilities in respect of the property such as environmental liabilities, insurance and health and safety liabilities. In order to minimise the risk to the lender in respect of environmental

liabilities, the lender should consider carrying out an environmental audit prior to becoming a mortgagee in possession so that it knows the extent and nature of the environmental risks that it is taking on.

A mortgagee in possession will usually look to sell the property quickly in order to effect repayment of the debt as soon as possible. However, market conditions may, as currently, not provide the optimum market for sale of the property. It is important to note that a mortgagee in possession has a duty to the mortgagor to take reasonable care to obtain a proper price on sale. Prior to agreeing a sale of the property, therefore, the lender will need to be able to show that it has marketed the property properly, and for long enough, to fulfill that duty. A lender who fails to discharge this duty and consequently sells the property at an undervalue may be found liable to the mortgagor.

- If the lender, as mortgagee in possession, is granting leases in respect of the property then the lender must attempt to do so at full open market rent.

- In addition, a lender, as mortgagee in possession:

- a) will in most circumstances become liable for lease covenants;

- b) must take reasonable care of the property and will be liable to the mortgagor in negligence if it does not do so; and

- c) may be in rateable occupational of the property and therefore become liable for nondomestic rates, and may also become liable for the other usual occupier's liabilities (in respect of visitors etc) under statute.

- If the borrower/mortgagor has been developing a property which is only partially built at the point when the lender takes possession, the lender, as mortgagee in possession, will likely have to take on the liabilities of the borrower/mortgagor for progressing the development and paying the building contractor and professional team.

A lender (provided it is a chargee under a properly-drafted legal charge) can on default by the borrower/mortgagor appoint a Law of Property Act Receiver (commonly known in England as an "LPA Receiver") under the statutory powers conferred by the Law⁷⁴, which will usually be enhanced in the legal charge itself. A Receiver has extensive powers but in essence his/her role is to manage the property and collect any rents for the benefit of the lender.⁷⁵

A Receiver, whilst appointed by and owing a duty to the Mortgagee, will be an agent of the mortgagor thus reducing the risk to the mortgagee. The Receiver effectively "steps into the mortgagor's shoes". A legal mortgagee has a right to take possession of the mortgaged property and this right is immediate, not contingent upon default of payment of the amount. A legal mortgagee has the power to appoint a receiver where the mortgagor defaults to pay. Where the mortgage is an equitable mortgage created by deed, the deed should provide for the power to appoint a receiver⁷⁶. A mere deposit of title deed will merely creates an equitable mortgage as decided in **F.B.N. PLC. V. Songonuga**⁷⁷. In **Adetola & Anor V. Zenith International Bank**⁷⁸ the court defines a person appointed by the court for the purpose of preserving the property of a debtor pending an action against him or applying the property in satisfaction of a creditor's claim whenever there is a danger that in the absence of such appointment, the property will be lost, removed or injured.

⁷⁴ Law of Property Act 1925

⁷⁵ http://www.ehow.com/list_6630146_duties-mortgagee-possession.html#ixzz1CKvnb6K4

⁷⁶ **Yaro V. Arewa Const. Ltd (2007) 17 NWLR (Pt.1063) p.333**

⁷⁷ **(2007) 3 NWLR (Pt.1052) 230**

⁷⁸ (2008) F.W.L.R. (Pt.440) p.796

In appointing a Receiver (rather than being a mortgagee in possession), the lender will assume neither the liabilities of nor responsibility for the property. However, on a practical note, a lender may be asked to give an indemnity to the Receiver in respect of any liabilities that the Receiver incurs in its role as Receiver. In practice, Receivers may be unwilling to act without such an indemnity; however, in the current climate lenders may find that some will be willing to do so in a bid to obtain the instructions to act for the mortgagee.

A Receiver can be appointed to continue to gather rental income at the property until market conditions improve in order for the property to be sold with a higher return. This allows the lender greater flexibility in the timing of the sale and therefore, in theory at least, increases the chance of the lender recouping a greater part of the outstanding debt.

A Receiver will have a similar duty to that of a mortgagee in possession in respect of any sale of the property. In the case of the Receiver, this duty is to obtain "the best price reasonably obtainable" for the property. However, the important thing to remember here is that, in the case of a Receivership, this duty falls on the Receiver rather than the lender, though if the lender has given the Receiver an indemnity then the liability for any failure by the Receiver to discharge the duty may (depending on how the indemnity is worded) find its way back to the lender.

By contrast, in the case of a mortgagee entering into possession, the duty to take reasonable care to obtain a proper price on sale rests directly with the mortgagee/lender.⁷⁹

⁷⁹ http://www.ehow.com/list_6630146_duties-mortgagee-possession.html#ixzz1CKvnb6K4

As you will see from the points above it is clear that a lender, in assessing whether to become a mortgagee in possession or to appoint a Receiver, will invariably be more comfortable in appointing a Receiver as less risk is incurred by the lender in so doing. It is imperative, however, that the appointment of the Receiver is done correctly in order to ensure that it cannot be challenged and that the terms of the appointment fully protect the lender. We would advise that legal advice be obtained in respect of the rights and obligations of the lender prior to making an appointment of a Receiver or becoming a mortgagee in possession or indeed taking any other enforcement action.⁸⁰

Where a mortgagee obtains possession of a property by surrender, peaceable possession (where possible) or a court order, it will become a mortgagee in possession. This carries certain duties and rights.

In the case of a mortgage or debenture by a company, the bank as mortgagee in possession or a receiver may be able to carry on the company's business if the mortgage included a fixed and a floating charge over all or enough of the business assets. A mortgage by an individual will, for certain legal reasons, only cover land, buildings and fixtures. Therefore, it is not generally possible for a mortgage by an individual to allow the mortgagee in possession to conduct a business.

Powers

A mortgagee in possession may sell the property. Provided (as would be usual), that there is a power of sale in the mortgage or the statutory power applies⁸¹, the property can be sold without a court order.

⁸⁰ <http://www.lavellecoleman.ie/England-Wales-Law.aspx>

Alternatively, the property may be let or continue to be let, in order to generate an income.

The mortgagee can exercise the powers itself or it may be entitled to appoint a receiver to exercise the powers on its behalf. Receivers carry certain advantages. Where there is a lease or tenancy in existence which binds the bank (because, for example, the bank consented to it or it predated the mortgage), possession is taken by taking possession of the rents. This is done by giving notice to the tenant requesting payment of the rent directly to the mortgagee⁸².

After the bank as mortgagee has taken possession, the borrower / mortgagor has no right to collect rent from the tenant. If the tenant pays the rent in error to the borrower after notice has been given, the mortgagee may still recover it from the tenant.

The bank may choose to sell a property under its power of sale with the tenant in place. This may be the most appropriate means of realising the security. The bank has some general obligations in relation to how it exercises its power of sale. Unless there was some good reason to the contrary, a sale with a tenant in place will be permissible.

If the tenancy does not bind the bank (because for example, it was made without consent) the bank is not entitled to demand rent as such. However, the bank may create a new tenancy by requesting and accepting rent. Alternatively, the bank may take action for possession of the property. Obtaining peaceable possession, other than by the tenant's voluntary surrender, is not usually possible. A court order is usually

⁸² *Mijac Investments Pty Ltd v Graham (No 2)* [2009] FCA 773

required. There is a special short summary court procedure for obtaining possession in these circumstances.⁸³

A mortgagee in possession of land may accept surrenders of leases and grant new leases under certain conditions set out in the Law of Property Act. The powers may be delegated to a receiver in the mortgage deed.

Application of Proceeds

A mortgagee is obliged to apply the receipts from the property, such as rents and profits as follows paying outgoings, paying interest on prior mortgages, paying costs and expenses; paying interest on the mortgage, and paying any surplus in discharge of the principal. A mortgagee who takes possession is not allowed to take any advantage beyond securing payment of the mortgage. It must use reasonable diligence to use the property in order to realise the money due, having regard to the fact that the property may ultimately be restored to the mortgagor, if there is a surplus.

A mortgagee must “account” for rent and profit actually received and also rents and profits which would have been received, but for its willful default. The mortgagee must therefore take reasonable care to maximize the return from the property. This duty is often reduced by the terms of the mortgage.

The person to whom the mortgagee must account for any surplus (if any) depends on who is interested in the property after the mortgagee. There may be a second mortgage. If there is none, the person to whom account is made, is the borrower /owner.

⁸³ <http://chestofbooks.com/real-estate/mortgage-Law/sec-302 Rights-possession.html>

A mortgagee in possession cannot charge a commission, but can recover for necessary outlay and expenses. A mortgagee in possession is generally entitled to claim the cost of rent collection and agents' expenses⁸⁴.

If the mortgagee in possession manages the property through an agent or employees, it may generally charge for their salaries. The mortgagee is not generally allowed anything for its' own internal costs in collecting rents although the mortgage may provide that a commission is payable.

Duties of Mortgagee

If the mortgagee itself takes possession and uses the property, it would be obliged to pay rent for occupation. This is not the case if the occupation is for the purpose of a sale within a reasonable time.

If a property is vacant and it is appropriate, the mortgagee should attempt to let it at a proper rent. However, there is no duty to do so, if this would impede the sale or if the tenant might obtain statutory rights.

A mortgagee will only be liable in respect of rent he would have received, if the failure to receive it is due to his serious default, mismanagement or fraud. This could arise by removal of a satisfactory tenant, by letting at undervalue or by making improper use of the property.

A mortgagee in possession must take reasonable care not to damage or neglect the property. It must take reasonable steps to protect the property such as securing it against vandals. The mortgagee should insure the property. The mortgagee is entitled to add the reasonable and proper expenses incurred in preserving the property from damage. The

⁸⁴ <http://www.independent.co.uk/news/uk/law-report-case-summarisies-1563451.html>

principle of salvage gives priority in respect of certain necessary expenditure, even where that priority would not otherwise be available.

Where the mortgagee takes possession of a leasehold property, it becomes liable on the covenants in the lease. The mortgagor will be allowed expenditure in preserving the security such as, for example, arrears of rent and expenditure to prevent forfeiture of a leasehold property. The mortgagee may be allowed compensation paid to an outgoing tenant to obtain vacant possession. The mortgagee should inform the borrower and lower ranking mortgagees of the necessity to incur extraordinary expenses. This may be most relevant where buildings are incomplete or have become unsafe.⁸⁵

Other Liabilities of Mortgagee in Possession

There is potentially onerous legislation in the UK in relation to liability to clean up contaminated land. See our development and construction guide on our website. A mortgagee in possession may fall within the category of persons who may be made liable for clean up obligations, under certain circumstances. Even where a receiver is appointed, this may not be enough to avoid the legislation.

In some circumstances a mortgagee in possession may be in rateable occupation of the property and the liable for business rates.

A mortgagee in possession usually has control of the property and is therefore liable for accidents that occur. A mortgagee should therefore obtain appropriate liability and buildings insurance.

Repair

A mortgagee in possession must take reasonable care of the property. It may carry out reasonable repairs, but generally need not do so. It is not

⁸⁵ This is an extract from our "Legal Guide to the Management and Enforcement of Security in England and Wales for Irish Lenders (2009).

judged by the standards which an owner would be judged by. It need not increase its debt by laying out large sums beyond the immediate requirements. It need not rebuild ruinous premises. The cost of reasonable repairs will be allowed in the accounts as to entitlement. It will not be held responsible for deterioration of the property by ordinary lapse of time, unless it is proper for such deterioration to be remedied. However, it need not increase the debt substantially by undertaking significant improvement. It need not rebuild a ruinous building law generally, there will be powers in the mortgage which will be assistance to the mortgagee. There will generally be a power to undertake repairs, if the mortgagor does not do so and recover the cost for the mortgagor⁸⁶.

Improvements

A mortgagee in possession may make reasonable improvements to the property. The improvements should not be of a value, nature and extent which makes it impossible or difficult for the borrower to redeem the mortgage debt. This is part of the equitable principle that a mortgagor who redeems must pay all that is equitably due. The mortgagee may also carry out works as are necessary to prevent a forfeiture of the title. The works must be reasonable having regard to the nature of the security.

A mortgagee will not lose his right to claim for improvements by not notifying the mortgagor or lower ranking mortgagees, provided the works are reasonable and beneficial. Where the mortgagor consents, it does not follow that the mortgagee will recover the cost of unreasonable expenditure.

⁸⁶ <http://www.legislation.govt.nz/act/public/1952/0051/latest/DLM267885.html>

The mortgagee will have a stronger claim to repayment, if it can be shown that the improvement added to the sale price to the extent of expenditure or more. In appropriate circumstances where there are buildings which are incomplete, the mortgagee may complete them or even pull them down and rebuild them. The rebuild or improvement must add to the substantially to the value. The Law of Property Act sets out the mandatory order of entitlement to payment of the proceeds of sale when the statutory power is exercised. Included are payments of all costs, charges and expenses properly incurred by him as incident to the sale or attempted sale or otherwise. Some improvement expenditure may be capable of qualifying under this heading, depending on the circumstances⁸⁷.

A mortgagee in possession needs to take great care in undertaking improvement works. Issues may arise as to whether the expenditure will be allowed under the default rules as against the lower ranking mortgagees and the mortgagor. Particular problems arise in applying the rules where there are known later charges, which limit the priority of the earlier mortgagee in respect of extent of its secured debt. The better course is to agree the improvement works with lower ranking mortgagees and /or the mortgagor who rank lower in entitlement to the proceeds of sale.

Salvage

There is a separate principle of salvage. Salvage is an exception to the normal rules as to priority. Salvage involves action taken by one interested party for the benefit of all other interested parties. An example would be where a mortgagee pays rent arrears in order to avoid forfeiture of the lease under which the property is held. The payment is

⁸⁷ <http://www.legislation.govt.nz/act/public/1952/0051/latest/DLM267885.html>

likely to have priority, even when paid by a lower ranking mortgagee. This is because it is made to save and secure the position of all mortgagees. This is an exception to the normal rules.

Generally, the principle is only applicable to removing legal risks. There must be an absolute necessity. It is possible the courts may apply the same broad equitable principles to necessary physical works.

Potential liability as a “shadow director”:

If a corporate mortgagor is allowed to continued operating their business from the land, a mortgagee in possession should refrain from directing the mortgagor’s conduct lest they be deemed a shadow director , “Director” includes someone who controls the exercise of the Board’s Powers⁸⁸:

Liability to third Parties in Tort:

Mortgagee in possession is personally liable for his own tort such as trespass, nuisance or conversion.⁸⁹ Additionally, when repudiating or otherwise preventing the performance of a mortgagor’s existing contracts, mortgagees in possession risk liability for the tort of inducing breach of contract.

If mortgagees including those in possession, exercise their powers in an “oppressive” manner⁹⁰, “Oppressive, harsh, unjustly burdensome, unconscionable, or in contravention of reasonable standards of commercial practice” the courts have a wider remedial discretion and can direct mortgagees, to do or refrain from doing in relation to any other party any act or thing⁹¹.

⁸⁸ Sections 244 & 245 of the Companies and Allied Matters Act Cap C. 14 Laws of the Federation of Nigeria, 2004, attracting the duties, obligations, and potential fines inflicted upon directors by the Companies Act 1993. See James O’Dovovan “Banks as shadow Directors” 1995) 25 VUWLR 285.

⁸⁹ see LNZ Receivers, above n 85, para 51, 56.

⁹⁰ see s. 10 (b) Credit Contracts Act 1981

⁹¹ s. 14 (1) (f) Credit Contracts Act 1981, section 9 Credit Contract Act 1981,

Statutory formulation of the duty upon sale in New Zealand.

In New Zealand, mortgagees in possession must take reasonable care to obtain the “best price reasonably obtainable at the time of sale”⁹². What amounts to reasonable care will vary from case to case. Mortgagees owe this duty to the mortgagor, which by statutory definition includes subsequent encumbrances. By Section 2⁹³ mortgagor includes anyone entitled to redeem a mortgage, and subsequent mortgagees can redeem a prior mortgage. The mortgagee’s duty to these additional people is governed solely by duty of good faith. Though this will probably not obligate mortgagees to delay their sale in anticipation of improved market conditions⁹⁴,

In summary, a mortgagee must avoid oppressive conduct, act in good faith and upon entering into possession, and avoid behavior amounting to willful default⁹⁵. The beneficiaries of these duties vary, but do not extend beyond the mortgagor, subsequent encumbrances, guarantors and faith. In contrast, a mortgagee’s appointed receiver must act in good faith and, to the extent consistent with that duty, have reasonable regard to the interests of others, including a potentially long list of unsecured creditors.

⁹² See s 103 A PLA 1952,

⁹³ Property Law Act 1952

⁹⁴ Henry Roach (Petroleum) Pty Credit House (Vic) Pty Ltd (1976) VR 309, 313 per Iush J (Vic: SC); Countrywide Banking Corporation v Robison (1999) 1 NZLR 75, 77 per Cooke P (CA); Garden City Developments Ltd v Cavell Leitch Pringle & Boyle Nominees Ltd 28 April 3 All ER 54, 59 per Lord Templeman (PC.)

⁹⁵ See Interestingly the New Zealand Bankers’ Association’s Code of Banking Practice advocates a standard of care more stringent than that required by law, stating that banks will act “fairly” and “reasonably”. See Mark Russell, Stuart Walker & Jogn King (eds) “New Zealand” (1997) 8 J Banking Law & Practice 86.

A mortgagee in possession can only receive an indemnity through contract and is personally liable for new contracts he makes and for existing contracts of the mortgagor he adopts⁹⁶

Though there are four main exceptions:

First, only mortgagees in possession as deemed reversionary, automatically inherit the burden of leasehold covenants which touch and concern the land⁹⁷. Not covenants that are personal to the landlord mortgagor.

Secondly, he is liable for paying the mortgagor's rent⁹⁸, although mortgagees in possession need only pay rent out of income from the land⁹⁹.

Thirdly, mortgagees in possession, if they wish to use the mortgagor's hire-purchase property, will have to negotiate a separate hire-purchase contract.

Fourthly, if a mortgagee in possession wishes to retain employees' services they will be personally liable for all employers' obligations, including paying wages and salaries. A mortgagee in possession acquires all the statutory obligations of an employer, for example purchasing insurance against work-place accidents¹⁰⁰, and is liable for breaching any term of their employment contracts.

CONCLUSION

A mortgagee who takes possession is bound to account strictly to the mortgagor for his actions while in possession. This explains why in

⁹⁶ see Halsbury's Law of England (4 ed, Butterworths, London, 1980) vol 32, Mortgage, para 693, 316; RA 1993, s 32 (1).

⁹⁷ See P & A Swift Investments v Combined English stores group Plc (1989) 1 AC 632 (HL).

⁹⁸ Compare the position under the general law Re J W Abbott & Co (1913) WN 284 (entry into possession does not imply a willingness to pay the mortgagor's rents; Rangatira Proprietary Ltd v Viola Hallam Ltd (1957) NZLR 1188, 1191 per Shorland J (SC) dealing with receivers.)

⁹⁹ See s 110 LTA 1952 AND S. 32 (5) RA 1993.

¹⁰⁰ Section 169 Accidents Insurance Act 1998

practice mortgagee does not take possession until there is default by the mortgagor. In view of the onerous obligations imposed on a mortgagee in possession, lenders should think through the consequences of taking possession in cases where a quick sale may not be achieved.

Despite plethora of judicial decisions to the effect that a mortgagee is entitled to possession of mortgage property, in practice the mortgagee's right to peaceable re-entry is hindered by various statutory provisions.

In Nigeria for instance, the various Recovery of Residential Premises Edicts of different states prescribed stringent procedures for obtaining possession. The implication of this is that in a property being occupied by tenants, the mortgagee might incur huge sum of money to get vacant possession in the event that the tenants are not disposed to pay rent to him as against the mortgagor.

Also, there is the strong possibility of the mortgagee being civilly held liable for trespass in the event of self help, and faced with this prospect; most mortgagees disposed off the property with tenants and this sometime affects the value as many prospective purchasers may not be encouraged.

It is suggested that the different laws for recovery of possession should be amended to include provisions that once the parties have agreed on a reasonable period for notice or a demand for possession, such notice should suffice for possession without any liability for re-entry by the mortgagee.