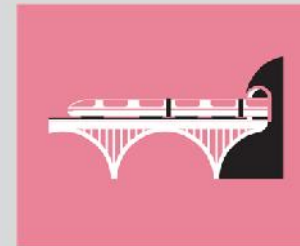


Mortgages: just beyond the beginning

Cecily Crampin



Falcon Chambers

www.falcon-chambers.co.uk

The beginning

- What I used to buy my house
- 'The lender has the right to possession before the ink is dry on the mortgage'
- Mortgage possession proceedings: s36 of the Administration of Justice Act 1970



Before the ink is dry on the mortgage

Before 1926:

- Mortgage by conveyance of estate subject to right (and equity) of redemption

After 1926:

- Law of Property Act 1925 (Part III): charge by deed by way of legal mortgage

S85: mortgage of freehold by a demise for a term of years absolute or charge by deed by way of legal mortgage

S86: mortgage of leasehold by a subdemise of a term of years absolute or charge by deed by way of legal mortgage



Land Registration Act 2002

S51: A charge created by a registrable disposition of a registered estate has effect as a charge by deed by way of legal mortgage.

The importance of entering a restriction.

Charge by deed by way of legal mortgage

Law of Property Act 1925

S87: the mortgagee shall have the same protection, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of the rents and profits, or any of them) as if

- (a) Where the mortgage is of a freehold, a mortgage term for three thousand years had been created in favour of the mortgagee
- (b) Where the mortgage is of a leasehold, a sub-term less by one day than the term vested in the mortgagor had been created in favour of the mortgagee



Why does the lender have the immediate right to possession?

B

|

M

FH

|

B

|

M



Second mortgage

B
|
M1

B
|
M2
|
M1



Whose interests bind the lender?

- S99 LPA 1925: borrower in possession has power to grant a lease which binds the lender.

B

|

M

B

|

M

|

LH



S99(13): the section applies only if and so far as the contrary intention is not expressed in the mortgage deed or otherwise in writing.

B
|
LH
|
M

Lender can take possession against LH as a trespasser.



Administration of Justice Act 1970

S36:

- Mortgagee under a mortgage of land which consists of or includes a dwelling-house
- Brings an action in which he claims possession of the mortgaged property
- The court may adjourn, stay or suspend execution, or postpone the date for delivery of possession

If it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default of a breach of any other obligation arising under or by virtue of the mortgage



Brings an action

No s36 power if the lender takes possession without the assistance of the court

Ropaigealach v Barclays Bank Plc [2000] QB 263

S6 of the Criminal Law Act 1977: use or threat of violence for the purpose of securing entry into any premises is an offence provided that there is someone present who is opposed to the entry



Possession of the mortgaged property

- Who is the correct defendant in a mortgage possession claim?

Esso Petroleum Co Ltd v Alstonbridge Properties Ltd [1975] 3 All ER 358

- The availability of s36: tenants, trespassers



S36: arrears – how long?

The mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage ...

- The Norgan number
- Sale
- At the end of the term

LBI HF v Stanford [2015] EWHC 3131 (Ch)

Post the end of the term (2012), on payment of the apparent shortfall, £1 million, second suspension after 7 months for a further 4 months



Unlawful letting

The mortgagor is likely to be able within a reasonable period ... to remedy a default of a breach of any other obligation arising under or by virtue of the mortgage

‘Any other obligation’ need not affect the lender’s security: *Britannia Building Society v Earl* [1990] 1 WLR 422

Reasonable period?



Death

If the mortgage permits the lender to take possession on the death of the borrower

Does s36 apply?

S39 of the AJA: mortgagor includes a person deriving title under the original mortgagor

A receiver's possession claim

When the receiver with a right to take possession takes possession against the borrower's tenant (or the borrower himself)

S39 of the AJA: mortgagor includes a person deriving title under the original mortgagor



Falcon Chambers

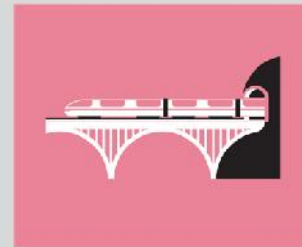
Falcon Court
London
EC4Y 1AA

T: 020 7353 2484

F: 020 7353 1261

Email: clerks@falcon-chambers.com

DX: 408 Lond/Chancery Lane



Falcon Chambers

www.falcon-chambers.co.uk