

Week 1- Introduction to Mortgages and Components

- Mortgagor's obligation to repay debt: An equity of redemption exists from the time mortgage is granted (which can be mortgaged itself as an equitable interest) so the mortgagee can just repay for late redemption [Gray 14.9, Noakes & Co Ltd v Rice].

Creation of Old System Mortgages:

Legal- s 23BCA deed- legal fee simple assigned to mortgagee as security. Subsequent legal mortgages cannot be granted b/c there is nothing left to grant.

Equitable- In writing or oral and supported by part performance (i.e. deposit of title deeds- s 54A CA). Created through attempt to grant what is left over from after the legal interest is parted with, enforceable agreement (Walsh) or deposit of title deeds (Norris)- provided this is done with intention of providing security over the land to which they relate.

Creation of Torrens Mortgages:

Registered mortgage: Will be stated in question. Acts as a statutory charge over the land only (s 57 RPA). Registered proprietor obtains benefits of indefeasibility so they retain both the legal and equitable estate. A string of registered mortgages can be created, although practically all subsequent mortgages will be taken subject to those earlier in time (Matzner). Unregistered mortgage (Barry): Created through- failure to register mortgage, mortgage not in registrable form, created through deposit of CT with mortgagee or through an enforceable agreement to grant a mortgage (Walsh).

NOTE: See larger notes for leasehold mortgage elements.

Mortgages under the National Credit Code (NCC):

A mortgage falls under the NCC if the mortgage:

- i) Secures loans to natural persons or strata corporation (mortgagor)
- ii) Credit/loan is wholly or predominantly for personal, domestic or household purposes or to purchase, renovate or improve residential property for investment purposes or to provide refinance for such purposes.
- iii) Lender (mortgagee) must be in business of providing credit.

Clogs on the Equity of Redemption

If there are no clogs, equity ignores the formal terms of the agreement and mortgagor is permitted to redeem on repayment of the amount owing (Noakes). Approach (Westfield Holdings):

- i) Is it a clog on the equity of redemption?
- ii) Even if so, is it unconscionable?

Clogs include:

- 1) **Devices extinguishing equity of redemption-** Term allowing mortgagee to purchase property before date of mortgagor's right to redeem is reached is invalid (Fairclough v Swan Brewery). For a mortgagee option to purchase property collateral to mortgage it will likely be a clog, although if there is an option to purchase and the mortgage is merely collateral to this, there will likely be no clog. Also, devices reserving interest in property after exercise of right to redeem is invalid (Seton).
- 2) **Devices which postpone right to redeem-** Mortgagee can impose terms denying right of redemption before a certain date provided it is a reasonable date, dates themselves may not be determinate (Morgan). Where postponement is so far into the future it is illusory, this is invalid (Fairclough), court can bring forward date of redemption in response to this.

- 3) Collateral advantages- This occurs if a term in the mortgage grants the mortgagee a commercial adv beyond repayment of loan including interest (Kreglinger). A collateral adv is valid unless it is: unfair/unconscionable, is in the nature of a penalty clogging equity of redemption OR it is inconsistent w/ contractual and equitable right to redeem.
- 4) Misc: It is a clog for mortgage to up the interest rate on default (text 14.25). However, can be argued that recent cases (AMIEV-UDC Finance Ltd v Austin) says it will be enforceable if it is a genuine pre-estimate, and only will be struck down if out of proportion to mortgagee's anticipated loss. In Funding v Patane, increase of 4% on default was still valid. Charging a high rate of interest, then reducing it for early repayment is fine (Strode v Parker).
 - 'Acceleration clause'- Where mortgagor defaults, whole of principal is payable plus amount of interest to end of mortgage period is payable immediately. Struck down as a penalty if interest from whenever default occurs to end of mortgage period is not a genuine estimate of mortgagor's loss on default.

Redemption of Mortgages

Late Redemption: For both OS and TT, mortgagor must give 6 months notice of intention to redeem or provide 6 months interest in lieu if notice if mortgagor is redeeming late.

Early Redemption: Exists where: mortgage contains express provision, undue suspension of right to redeem, mortgagor defaulted and mortgagee took steps to enforce mortgage and s 93 CA where mortgagor must pay interest on unexpired portion of term, mortgagee only gets interest up until date on which loan is repaid, cannot be contracted out of (s 93(3) CA).

Week 2- Remedies of Mortgagee and Protection of Mortgagor

- Mortgagee right to sue on personal covenant to repay: If there is no express term requiring payment of money in the mortgage, the CL will imply one (NZI Capital Corp Ltd v Child). Once power of sale has been exercised, mortgagee can still sue on personal cov to recoup rest of the money/shortfall. If the mortgage falls under the NCC, mortgagee cannot sue on personal cov until mortgagor has been given a default notice, giving them 30 days to remedy default (s 88(2) NCC).
- Mortgagee right to assign: Both interest in land AND interest in repayment of debt can be assigned.
- Mortgagee right to sub-mortgage: Permissible for both OS and TT land. Original mortgagee retains an equity of redemption if they sub-mortgage to a new mortgagee.
- Mortgagee right to possession: For OS land, if there is a legal mortgage and mortgagee is not in possession under attornment clause, mortgagee has right to possession derived from its legal fee simple. It is more common where mortgagor is in possession under such a clause which gives mortgagee right to take possession on mortgagor's default. For TT land, there is no automatic right to possession so either an express right in the mortgage or s 60 RPA must be used. Under s 60 RPA, in event of default by mortgagor, mortgagee can take possession by either: i) Receiving rents and profits from the property OR ii) Court proceedings.
- Mortgagee power to lease: For OS land, s 106 CA means leases can be granted by mortgagee in possession provided: i) Lease does not exceed 5yrs, lease is at best rent obtainable, , lease contains right of re-entry if rent is in arrears AND must be registered in Deeds Registration System.