LLB301 – Real Property Law

3.4 Dealings with Land – Mortgages

Introduction to *Dealings with Land*

This category of notes deals with all dealings with land.

1. Torrens System
2. Sales
3. Leases
4. Mortgages
5. Easements

This topic of notes deals with mortgages of land.

Introduction

DEFINITION: A mortgage is a contract and type of security given by a landowner (mortgagor) to a lender of money (mortgagee) to secure the repayment of the loaned sum.

DUAL-ASPECT: As with leases, mortgages have a dual aspect:

1. The personal covenant: the mortgagor's promise to repay the loan; and
2. The legal interest in land: the grant of an interest in the land to the mortgagee by way of security.

Overview of Process

1. Torrens system mortgages – general introduction
2. Creation of a mortgage – has a mortgage been created?
3. Mortgage covenants – are the mortgage covenants valid?
4. Rights of the mortgagor – does the mortgagor have any rights?
5. Remedies of the mortgagee – what remedies does the mortgagee have upon default?

(#1) Torrens System Mortgages

1.1 Old System Mortgages

GENERAL PRINCIPLE: A mortgage of general law takes effect by way of a transfer of the legal title in the land to the mortgagee, and a promise to re-transfer back to the mortgagor on repayment of the debt.

EQUITY OF REDEMPTION: The mortgagor retains an equitable interest in the land, called the equity of redemption.

- Upon full repayment of the debt pursuant to the agreement, the mortgagee has a legal right to have the land re-transferred, called the legal right to redeem.
- Where the mortgagor has lost the legal right to redeem (e.g. because repayment of the debt was late), the mortgagor may still have a right to have the land re-transferred if he can repay the debt within a reasonable time, called the equitable right to redeem.
  - Reasonable time is usually up to 6 months.

FORECLOSURE: Loss of the legal and equitable right to redeem allows the mortgagee to foreclose the mortgage and become the absolute beneficial owner of the land.

- Mortgagee achieves foreclosure by application to the court on the basis that the mortgagor can no longer exercise its equitable right to redeem.
- Foreclosure results in outstanding arrears of the debt becoming unrecoverable.

1.2 Torrens System Mortgages

DEFINITION: A mortgage is a charge on a lot for securing money: *LTA* sch 2 (definition of 'Mortgage').

GENERAL PRINCIPLE: A mortgage of Torrens land takes effect by way of a charge over the land as security for the debt. The mortgagor retains ownership of the land during the period of repayment.

SOURCE OF OBLIGATIONS: The parties' obligations are contained in the instrument of mortgage, *Land Title Act* and *Property Law Act*.

(#2) Creation of a Mortgage

REQUIREMENTS: To create a valid legal mortgage, the following requirements must be satisfied:

1. **Essential covenants** - the mortgage must contain the essential covenants.
   - See 'Essential Covenants' below.
2. **Registration** – the mortgage must be registered.
   - See 'Registration' below.

ESSENTIAL COVENANTS: There are two covenants which are essential to the creation of a mortgage:

1. **Charging clause**; and
   - It is a covenant by the mortgagor charging his own interest in the land in accordance with specific terms in order to support his promise to repay the mortgagor the debt.
   - Old system approach of transfer by way of charge is allowable under Torrens: *Abigail v Lapin*.
   - **Mortgage v Sale**: look at the substance of agreement → is this a mortgage or a sale with an option to re-purchase under particular circumstances? (Jack and Tom Tutorial 10.1)
2. **Personal covenant to repay**.
   - It can be implied by *PLA* s 78(1).
   - For a registered mortgage, the deed creates a speciality obligation, meaning that release of the charge from the land does not destroy the personal covenant to repay.
     - Any outstanding debt can be claimed up to 12 years after the right to receive money accrued: *Limitations of Actions Act* s 26(1).

REGISTRATION: Registration is required to create the legal interest in the land: *LTA* s 181.

- Mortgagee must take reasonable steps to verify the ID of the mortgagor: *LTA* s 185(1A).
  - 'Reasonable steps' is 100 points of ID: *LTA* s 11A(3).

UNREGISTERED MORTGAGES: Unregistered mortgages are equitable mortgages. They can be created by either:

1. An informal charge over land: writing with sufficient information and signed by the mortgagor (or agent): *PLA* s 10.
2. A mortgage in registrable form prior to registration.
3. Deposit of the title deed with a creditor with the intention to create a charge.

"(#3) Mortgage Covenants on next page"