Security Interests: Mortgages

A security interest is a property right attached to a debt

• **Types of Mortgages**
  o **General Law Mortgage**
    - Legal title is transferred to the mortgagee while the debt is outstanding, but has a contractual obligation to reconvey it to the borrower when the debt is repaid
      - They are not entitled to possess or sell due to their equitable rights. Equity looks to the substance not form of the transaction: it is the provision of security for a loan, not a transfer of ownership
      - Mortgagor left with equity of redemption.
  o **Torrens System Mortgage**
    - It is not a “true” mortgage, rather a statutory charge or hypothecation security.
      - It crystallises when the borrower defaults.
      - The mortgagor remains the registered proprietor of the legal estate
      - Upon registration, the mortgagee acquires a registered interest in land in the form of a statutory charge, NOT the legal title (s 74(2) TLA)
      - Subsequent registered mortgages can be made
      - When debt is repaid, the mortgagor has a statutory right to call for a discharge
  o **Equitable mortgage (some of GLL and TSL)**
    - Equity would enforce a mortgage which did not satisfy the requirements of GLL or TSL if it was evidenced in writing OR in an oral agreement supported by sufficient acts of part performance \( ANZ \text{ v } \text{Widin} \)
    - An advance of a sum of money by the lender upon the borrowed handing over the title deeds are acts of PP
    - Creation of equitable mortgages without written documentation is now restricted by the NCC in transaction to which the code applies.

• **Right of the mortgagor**
  o **In Statute** \( \text{(National Credit Code)} \): A nationwide scheme the offers protection to people who enter into a credit arrangement
    - The NCC applies to mortgages if:
      - They secure obligations under a credit contract (s7a) and the mortgagor is a natural person or strata corp. (s7b); AND
      - The credit contract is a contract under which credit (debt deferred, defined in s3) may be provided (s4); AND
      - A charge is made for providing credit (s5(1)(c)); AND
      - A charge is provided in the course of business providing credit (s5(1)(d)); AND
      - The credit must be provided wholly or predominately for personal, domestic or household use (s5(1)(b)(i))
        - Predominately means more than half or where goods/services are mostly used for those purposes (s5(4)(a +b)
        - Investments which are not personal, domestic or household purposes (s5(3)).
        - If the mortgagor, before entering into the contract, declares that the credit is not predominately for a personal, domestic or household purpose, it will be presumed not to be for those purpose (s13) – this is rebuttable.
    - If a party claims the NCC applies to a mortgage, a presumption will arise that it does – this is rebuttable (s13).
    - The NCC doesn’t apply to a range of situations in s6, including a credit contract for less than 62 days [with conditions] or where credit is provided without prior agreement.
    - You cannot contract out of the NCC (s191)
Presumed code applies unless the debtor declares before entering contract that the credit is not obtained for a code purpose. This declaration is ineffective if the credit provider knew or ought reasonably to know that the predominant purpose was a code purpose. S 13

Key NCC provisions for Mortgages:
- S42 - Mortgage must be in writing and signed by the mortgagor.
- S44 - Mortgage must identify/describe the property. Mortgages over "all property" are void.
- S45 - Mortgage over future property are void unless the property is described/identified or in order for a property to be acquired with the credit.
- S48 - 3 party mortgages are prohibited.
- S49 - Mortgage is void if it secure more than the debt owed.
- S50 - list of prohibited securities
- S51 - Mortgagor cannot assign property without the consent of the mortgagee (1), however consent cannot be reasonably withheld (2). This carries a penalty of 100 units and is a strict liability offence.

The courts can re-open unjust credit contracts and mortgages on application by the debtor (s76(7)), and they may set aside or vary the contract or order a mortgagee to take steps to discharge a mortgage (s77).
- Unjust means unconscionable, harsh or oppressive (s76(8))
- Must be unjust at the time entered into or changed (s76(1))
- Courts can look at all circumstances (s76(2)) except circumstances that were not reasonably foreseeable at the time entered into or changes (s76(4))

ASIC Act
- Extends protection to mortgagors in cases of unconscionability
- S 12CB and 12CC
- Provides protection to mortgagors against misleading & deceptive conduct S 12DA

In Equity
- They have a contractual right to redeem if the loan is repaid by the due date; "equity of redemption" (the term is applies to TS and GLL, even though technically TSL does not have it)
  - If they choose to take out another mortgage on your equity of redemption: it is an equitable mortgage
    - If you only hold an equitable interest in land, you can only create an equitable interest in it
    - Enforceable against all but a bona fide holder of the estate.
- Mortgagee can further mortgage, transfer, or do anything they normally would with their proprietary interest.
- No 'clogs on the equity of redemption': Mortgagee cannot postpone equity of redemption after repayment.
- Unconscionability: Transaction procured by unconscionability or undue influence may be set aside by equity. Is it unconscionable to allow the mortgagee to enforce the transaction against the mortgagor when the mortgagee had closed his eyes to the vulnerability of the parties and the misconduct of the son eg, Amadio
  - Elderly Couple with little business experience
  - Unfamiliar with written English
• **Rights of the Mortgagee (we examine only TSL)**
  
  o **Note:** the NCC may affect the exercise of a mortgagee’s remedies (can re-open unjust transactions – however this power seems to be limited to circumstances existing at the time the mortgage was entered into rather than subsequent action by the mortgagor)

  o **Right to sue on personal covenant**
    - In mortgage there will be a specific provision whereby the principle sum and interest are made payable by a specific date
      - In absence, it may be implied by common law *Sutton v Stunnon*
    - On default (failure to pay principal or interest or comply with another covenant – s 76 TLA) can sue for a breach of covenant.
    - Right to sue can be used in conjunction with other remedies
    - The covenant is regarded in equity as being conditional upon the mortgagee’s ability to convey the property to the mortgagor *Palmer v Hendire*
      - If the mortgagor has dealt with the property in a way that it is impossible to restore it, the mortgagee will be unable to sue on the personal covenant.
      - **Exception:** If the mortgagee exercises a power of sale. They can sell the property and sue on the personal covenant. If they mortgagee forecloses and later sells, so that he or she is unable to restore the property, there can be no action on the covenant, even if the value of the property was not sufficient to realise the loan

  o **Right to take possession (s 78, 81 TLA)**
    - Mortgagee has no common law right of possession but receives a statutory right in cases of default (s76 TLA) which entitles them to the rents and profits (1) and a right to bring an action for ejectment (2). (Usually also receives this right under the mortgage document)
    - § 81 gives the same general law rights and remedies as a legal mortgagee to the first Torrens system mortgagee, thus mortgagee entitled to possession without final demand or notice and without the need of an action for ejectment (as the legal mortgagee has the legal title and thus the right to possession on default)
    - Residential Tenancies Act Section 268: if mortgage was entered into with LL prior to lease commencing, and the mortgagee wants to sell or lease land they must give you 28 days
    - If the mortgagee goes into possession and doesn’t allow it to reach its full potential (there has been gross mismanagement) – then they can be liable to compensate the mortgagor.
    - Courts were not prepared to read the same level of protection to obligatormortgagor. (Sutton v Stunnon)

  o **Right to sell (s76, 77 TLA)**
    - To exercise this right the mortgagree must serve a notice to pay after a default has continued for 1 month – s76 TLA
    - If within one month of this notice, the mortgagor fails to comply, the mortgagor may in good faith and having regard to the interests of the mortgagor sell the land or any part of it (s77(1) TLA)
      - Words suggest that it can be shorter than a month, but if the NCC applies, the debtor must be given at least 30 days from the date of notice to comply with the notice. *Section 88(2) NCC*
    - This means that the mortgagee has an obligation to take reasonable steps to obtain the best possible price consistent with its entitlement to realize its security *Vasiliou*
      - Good faith imports a subjective element of honesty, fairness and a lack of fraud or collusion *Gussey*
      - If they had reasons to not subdivide this is evidence to suggest they made a fair decision *Gussey*

  - *Laura 26/5/13 3:45 PM*
    - [Comment [1]:] 8 used home as security to guarantee debt then defaulted. Nolan was distinguishable as it concerned the exercise of the power of sale, not possession.

  - *Laura 26/5/13 3:53 PM*
    - [Comment [2]:] V’s home was mortgaged to Westpac and rented to F. V defaulted and W took possession. F got independent valuation of $400,000 and offered to buy – Westpac accepted after seeking 2 certified valuation and one appraisal – all indicating property was worth less than F offered. V sought to set aside sale as property next door reached $800,000. Only had one appraisal for $500,000. Court decided: no bad faith. Distinction between best and proper price immaterial as $400,000 was both.

  - *Laura 26/5/13 3:42 PM*
    - [Comment [3]:] Mortgagee exercised power of sale. Mortgagor argued that land should have been subdivided in order to maximise price. Subdivision was decided against for very good reasons (delay, demolishing a house) – because they considered the option there was no breach.
• Look at who made the valuations, if it was an informal appraisal, less convincing Vasiliou
• Whether or not advertising was present is not a decisive factor. Look at whether it was a necessary step in obtaining the best price Vasiliou
  o If the price is satisfactory, the failure to advertise will be immaterial
  o If the price is unsatisfactory, the fact the property was advertised is not a defence to section 77(1)
• Cannot sell for a purpose other than that which the power of sale is conferred MBF Investments
  • However, this duty is not limited to obtaining the best price only MBF Investments v Nolan
  • The mortgagor’s interests do not have to be placed above the mortgagee’s own. MBF Investments
  • Mortgagee must have regard to the interests of subsequent security holders. If there are two lots and there was doubt as to whether selling the less expensive one would raise a sufficient sum to permit later security interests to be discharged, then the more expensive one will be sold. MBF Investments
• REJECTED: Interest should also include the mortgagor’s right of redemption and home occupation interests, however these were rejected in the 2011 appeal MBF
  o Nolan did not have home occupation interest as he didn’t have the right of a holder of a fee simple estate MBF
• Right to quiet enjoyment of premises lost on default
• Must act in good faith however, that is to act conscionably and to not sell for a purpose other than to realise security.
• Look at Vic Charter of Human Rights and Responsibilities – re the right to home. This was not addressed in MBF
• Mortgagee cannot sell the property to him/herself
  • Remedy for Mortgagor: A registered purchaser acquires the title of the mortgagor free of the mortgage (s77(4) TLA). This cannot be set aside even if the power of sale was exercised unlawfully, unless there was fraud/collusion (s 42 (1) TLA) Mortgagor would sue for damages instead.
    • A purchaser will not receive an indefeasible title if they knew of a breach by the mortgagee in exercising the sale Latec Investments
    • If proceeds of sale are insufficient to cover the debt too bad.