

Mortgages and LPA receivers – important issues

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Welcome and introduction

- The remedies of the mortgagee
- Decision making by the mortgagee - *UBS AG v Rose Capital Ventures Ltd* (2018)
- The powers of the mortgagee and land registration - *Skelwith (Leisure) Ltd v Armstrong* (2015)
- The duties owed by LPA receivers - *Devon Commercial Property Ltd v Barnett* (2019)

The mortgagee's remedies

Five principal remedies

- All of the below remedies are available to a legal mortgagee
 1. Part 7 claim in debt (not a claim on the security)
 2. Foreclosure
 3. Sale
 4. Possession
 5. Appointment of a receiver
- Equitable mortgagees' (and chargees') remedies can be more problematic
- Apart from foreclosure, each of the above remedies can be exercised cumulatively e.g. a mortgagee take possession, appoint a receiver to sell, and then itself claim any shortfall from the mortgagor in debt

Debt claim / Foreclosure

Debt claim

- This is a claim on the loan, not a method of enforcing the security
- ✓ May be helpful where a borrower has other property over which a judgment debt can be secured
- × Often not sensible as a first choice remedy

Foreclosure

- Involves a transfer of the mortgaged property to the mortgagee & a destruction of the mortgagor's equity of redemption: *Palk v Mortgage Services Funding Plc* [1993] Ch 330
- ✓ Key remedy for an equitable mortgagee
- × Need to issue a Part 8 claim and obtain a Court order
- × Not final – wide discretion for the Court to reopen foreclosure order
- × Why would a mortgagee want to have the property with all of its liabilities rather than the value of the land?

Sale

Key points

- Statutory power to sell (and invariably an express power in the charge itself): ss101-107 Law of Property Act 1925
- Power of sale must have arisen and be exercisable; s101 LPA 1925
 - Power arises if there is
 - mortgage by deed
 - mortgage money due
 - Power exercisable usually only where there is
 - sufficient notice / arrears / breach of mortgage deed (unless this is dispensed with)
- Mortgagee becomes a trustee of the proceeds of sale which must be applied in a particular order: s105 LPA 1925

Sale

Advantages & disadvantages

- ✓ A mortgagee can sell without a Court order and without taking possession: *Horsham Properties v Clark* [2009] 1 W.L.R. 1255
- ✓ It may be better to sell if there are low interest rates and property values are continuing to fall

- × Risk where there is limited equity in the mortgaged property
- × Limits on sale without possession in the residential context: lenders who are members of UK Finance have voluntarily agreed not to sell without first obtaining possession

Possession

Key points

- Fundamental to the nature of a mortgage historically
- Mortgagee “may go into possession before the ink is dry on the mortgage”: *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317
- If a residential mortgagor is in arrears the mortgagee must comply with the Pre-action protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property

Possession

Advantages & Disadvantages

- ✓ Possible to take possession without a Court order in some cases
- ✓ Mortgagee entitled to rent and profits from the property
- ✓ Irrelevant whether the mortgagor has a monetary cross-claim against the mortgagee

- × Onerous duties on a mortgagee in possession
- × New CPR rule 55.29 imposes a further stay until 23/08/20
- × Involuntary moratorium on repossessions of residential & BTL properties until 31/10/20
- × Court has wide powers to adjourn proceedings or suspend a possession order

Appointment of a receiver

Key points

- Role/purpose: a person appointed with the power to collect rent and profits from the land in order to preserve the assets over which a lender has security
- Fixed charge receivers & “LPA receivers” under s101(1)(iii) LPA 1925
- Appointment formalities
- Duties: *Silven Properties v Royal Bank of Scotland* [2004] 1 WLR 997

Appointment of a receiver

Advantages & Disadvantages

- ✓ Mortgagee can avoid liabilities it would otherwise incur
- ✓ Receiver can bring possession proceedings (in own name) against a mortgagor occupying the property: *Menon v Pask* [2019] EWHC 2611 (Ch), [2020] Ch 66
- ✓ Receivers can be appointed alongside/before/after liquidators
- × Receivers appointed over freehold property can collect rent but what if rent is not being paid? what if business is slow and there are no profits?
- × Extending the analysis in *Menon*, this means a receiver will be bound by unauthorised tenants in the property when seeking possession
- × Sale is the usual end-goal but might be difficult in the current climate
- × Costs, and payment of expenses, can be problematic – especially if

things go wrong

Decision making by the mortgagee - *UBS AG v Rose Capital Ventures Ltd and others* [2018] EWHC 3137 (Ch), [2019] 2 BCLC 47



Background – limits on contractual discretion

- *Downsview Ltd v First City Corporation Ltd* [1993] AC 295
- *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 2

The decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661



The decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661

- Claimant's husband died whilst on service working on a ship
- Claimant's death in service benefit depended on the cause of death
- Final version of the investigation report: suicide

The decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661

- Teare J: held that the decision to refuse payment of benefit was unreasonable
- Failed to take into account a relevant factor, and failed to consider that cogent evidence was required before a finding of suicide
- Reversed by the Court of Appeal

The decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661

- Supreme Court – considered how a contractual discretion should be exercised.
- Opportunity to consider the extent to which a public law, *Wednesbury* test could be imported

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The decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661

Baroness Hale [18]:

- The party charged with making decisions affects the rights of both parties has a conflict of interest
- Courts have implied a term to the manner in which such powers may be exercised

The decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661

Baroness Hale [19]:

- Parallel between cases where a contract assigns a decision-making function and where a statute assigns a decision-making function to a public authority

The decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661

- *Paragon Finance plc v Nash* [2002] 1 WLR 685 – was there any implied term limiting the power of a mortgagee to set interest rates under a variable rate mortgage?
- Dyson LJ: implied term that the power would not be exercised dishonestly, for an improper purpose, capriciously or

The decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661

Hayes v Willoughby [2013] 1 WLR 935

- Lord Sumption [14]: Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intention
- A test of rationality applies a minimum objective standard to the relevant person's mental processes

The decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661

Baroness Hale [29]:

- If it is part of a rational decision-making process to exclude extraneous considerations, also part of a rational decision-making process to take into account those considerations which are obviously relevant

The decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661

Baroness Hale [30]-[31]:

- unless an implied term that outcome be objectively reasonable, will only imply a term that the decision-making process be lawful and rational in the public law sense
- Will depend on the terms and the context of the particular contract

The decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661

Lord Hodge [52]:

- The court is not to substitute its own view of what is a reasonable decision
- It conducts a rationality review

The decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661

Lord Neuberger:

- Cited *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] Bus LR 1304
- Rix LJ: a decision-maker's discretion will be limited by concepts of honesty, good faith, and genuineness

Wayne Courtney,
'Reasonableness in contractual
decision-making', L.Q.R. 2015,
131 (Oct), 552-556

- “The adoption of the full Wednesbury test thus stands on a relatively narrow basis. Courts must be cautious in seeking to generalise the reasoning to other contexts.” (555)

*Property Alliance Group Ltd v
Royal Bank of Scotland plc*
[2018] EWCA Civ 355, [2018] 1
WLR 3529

- Court of Appeal accepted that the power to obtain a valuation was not unfettered

*Property Alliance Group Ltd v
Royal Bank of Scotland plc*
[2018] EWCA Civ 355, [2018] 1
WLR 3529

- [168] RBS must have been free to act in its own interests and that it was under no duty to attempt to balance its interests against those of PAG

*Property Alliance Group Ltd v
Royal Bank of Scotland plc*
[2018] EWCA Civ 355, [2018] 1
WLR 3529

- Parties intended the power granted to be exercised in pursuit of legitimate commercial aims rather than, say, to vex PAG maliciously

*Property Alliance Group Ltd v
Royal Bank of Scotland plc*
[2018] EWCA Civ 355, [2018] 1
WLR 3529

- RBS could not commission a valuation for a purpose unrelated to its legitimate commercial interests or if doing so could not rationally be thought to advance them.

UBS AG v Rose Capital Ventures Ltd

The facts:

- D1 = Rose Capital
- 2012, Rose Capital borrowed £20.4m from UBS

UBS AG v Rose Capital Ventures Ltd

The facts:

- The loan was stated to be for a period of five years, subject to UBS's right in its absolute discretion to require repayment in full on giving three months' notice in writing.
- Before the five-year term expired UBS gave three months' notice to terminate,

UBS AG v Rose Capital Ventures Ltd

The facts:

- After the five-year term expired, UBS demanded repayment and sought possession against all the defendants

UBS AG v Rose Capital Ventures Ltd

The defence:

- The discretion to call in the loan early was subject to a duty of good faith and was not to be exercised in a manner that was irrational, arbitrary, capricious and/or unreasonable, applying *Braganza v BP Shipping Ltd*

UBS AG v Rose Capital Ventures Ltd

The application:

- Application to strike out the defence under CPR, r3.4(2)(a)

UBS AG v Rose Capital Ventures Ltd

Discussion:

- UBS accepted that it was subject to a duty of good faith
- Submitted that it was a narrow scope
- Entitled to put its own interests ahead of those of the borrower

UBS AG v Rose Capital Ventures Ltd

Discussion:

- The defendants submitted that the mortgage contract was a 'relational contract' and that a duty of good faith was to be implied, including a duty of cooperation and communication

UBS AG v Rose Capital Ventures Ltd

Chief Master Marsh:

- Cited the Privy Council decision in *Cukorova Finance*
- Additional purposes to a proper purpose did not vitiate enforcement of the security

UBS AG v Rose Capital Ventures Ltd

Chief Master Marsh:

- “[38] It follows that in the absence of an allegation that UBS's decision to call in the loan was disconnected from a desire to obtain repayment of the loan and to enforce its security, the duty of good faith will not avail the defendants. UBS was not required to have ‘purity of purpose’...”

UBS AG v Rose Capital Ventures Ltd

Chief Master Marsh:

- Considered the argument based on *Braganza*
- Noted that the legal principles approved and applied were well-established e.g. *Paragon Finance v Nash*

UBS AG v Rose Capital Ventures Ltd

Chief Master Marsh:

- Set out four principles at [49]

(1) It is not every contractual power or discretion that will be subject to a *Braganza* limitation

UBS AG v Rose Capital Ventures Ltd

Chief Master Marsh:

(2) types of contractual decisions that are amenable to the implication of a *Braganza* term are decisions which affect the rights of both parties to the contract where the decision-maker has a clear conflict of interest

UBS AG v Rose Capital Ventures Ltd

Chief Master Marsh:

(3) The nature of the contractual relationship, including the balance of power between the parties is a factor to be taken into account

UBS AG v Rose Capital Ventures Ltd

Chief Master Marsh:

(4) The scope of the term to be implied will vary according to the circumstances and the terms of the contract

UBS AG v Rose Capital Ventures Ltd

Chief Master Marsh:

- “The language of the contractual terms in this case could not be more stark.”
- The lender will have no plan to call in the loan immediately, but reserves the right to do so

UBS AG v Rose Capital Ventures Ltd

Chief Master Marsh:

- No basis for a *Braganza* term
- Mortgage lending has built up its own protections in the form of the duty of good faith

UBS AG v Rose Capital Ventures Ltd

Chief Master Marsh [57]: - if there was a term:

- “As long as the mortgagee exercises the power for proper purposes, and not for the sole purpose of vexing the mortgagor, it will neither be in breach of its duty of good faith nor a *Braganza* term, if one is capable of being implied on the basis of **business necessity**”

Issues with land registration

Skelwith (Leisure) Ltd & ors v Armstrong & Polar Holdings Ltd & Flaxby Park Ltd [2015] EWHC 2830 (Ch), [2016] Ch 345

Facts

- In 2008 **A** agreed in an SPA to sell a golf club (“**the Club**”) to **S** for £7m
- On 31 July 2009 **A** & **S** agreed that £3.525m of the price would be deferred
- On the same day the parties completed the sale & purchase; **S** charged the Club to **A** as security for **S**’s obligations under the SPA including payment of the deferred consideration (“**the Charge**”)
- **S** was registered as proprietor of the Club & **A** was registered as charge-holder

Issues with land registration

Skelwith (Leisure) Ltd & ors v Armstrong & Polar Holdings Ltd & Flaxby Park Ltd [2015] EWHC 2830 (Ch)

Facts (cont...)

- **A** alleged that **S** failed to fulfil obligations under the Charge & demanded some £4m
- In 2015 **A** assigned the benefit of the Charge to **P** & executed a transfer of the Charge to **P**
- **P** was not registered as the holder of the Charge at Land Registry
- **A** purported to give to **S** notice of the assignment of the Charge to **P**
- In February 2015 **P** purported to exercise the power of sale under s101 LPA 1925 & sell the Club as “mortgagee in possession” to Flaxby Park Limited (“**FPL**”) for £4m

Issues with land registration

The case

Parties cross-applied for strike out/summary judgment

Was **P** able to sell the Club to FPL despite:

- **P** not being registered as proprietor of the Charge, and
- **A** remaining as the registered charge-holder?

S argued that:

- **P** had failed to serve notice of assignment, was not a mortgagee in possession, and had no power of sale because it was not registered as proprietor of the Club

P argued that:

- Notice of assignment had been served, **P** was entitled to exercise “owner’s powers” despite not being registered as proprietor of the Charge, and **P** was granted a power of attorney by the Charge or was entitled to receive and give discharge for the mortgage money

Issues with land registration

Decision

Newey J. held:

- No real dispute that **P** was entitled to sell to FPL without obtaining possession
- But since **P** was not registered as the proprietor of the Charge it was not entitled to exercise the power of sale under LRA 2002:
 - *“It is apparent... that a person who is entitled to be registered as a proprietor, but who has not been, will not necessarily enjoy all the powers that he would have had if registration had been effected. It follows that section 24 of the LRA 2002 cannot mean that the powers of a person entitled to be registered as a proprietor are automatically to be equated with those of a registered proprietor. The distinction between legal and beneficial ownership evidently continues to matter.”* [57]
 - *“In other words, it is not enough for a person entitled to be registered as a charge's proprietor and with equitable ownership of it to demonstrate that he could have exercised a power had he been registered as the proprietor. He must also show that the power is exercisable by an equitable owner under “the general law“* [58]

Issues with land registration

Decision

Newey J. held:

- So **P** could not exercise owner's powers under s24 LRA 2002
- And **P** did not purport to sell the Club to FPL as attorney for **S**, so **P** was not entitled to sell under any express power of attorney
- But, "tentatively", **P** was, as an equitable assignee, "entitled to receive and give a discharge for the mortgage money" under s106(1) LPA 1925 so **P** had a power of sale under s101 LPA 1925

Issues with land registration

Analysis

- **P** succeeded by the skin of its teeth; a later appeal by **S** to CoA was dismissed
- How does this case sit with *Swift 1st Limited v Colin* [2011] EWHC 2410 (Ch)?
- A mortgagee (M) will be able to exercise the statutory power of sale if:
 - M has a legal charge & M is registered as owner (ss23-24 & 101 LRA 2002)
 - M has a charge by way of deed but M is not registered (*Swift*)
 - M is not the owner of the registered charge but is entitled to receipt of mortgage monies (*Skelwith*)
- M will probably not be entitled to sell under s101 LPA 1925 where
 - M only has an equitable mortgage without a deed
 - M is an equitable mortgagee of an equitable interest in land (e.g. a mortgage over a co-owner's beneficial interest)
- Practice points for those advising mortgagees and receivers
- **Lees (2016)**, 'Powers of the beneficiary of a trust of a charge' Conv. 2, 157-

The duties owed
by LPA receivers
- *Devon
Commercial
Property Ltd v
Barnett and
another* [2019]
EWHC 700 (Ch)



Introduction and outline

- Tripartite relationship between:
 - the receiver,
 - the appointing mortgagee,
 - The mortgagor (as agent)

(Medforth v Blake [2000] Ch 86, *per* Sir Richard Scott V-C

Conflicts of interest

- Rules about self-dealing and conflict of interest on a receivership sale are different to those applied on a sale by the mortgagee

Devon Commercial Property Ltd v Barnett



Devon Commercial Property Ltd v Barnett

- Decision of HHJ Paul Matthews after trial
- Claim brought by the mortgagees against receivers appointed under the Law of Property Act 1925

Devon Commercial Property Ltd v Barnett

The facts

- Claimant acquired the freehold of the Bottling Hall, Tiverton, Devon
- Leased 70% of the property to a connected company, Devon Cider Company Ltd

Devon Commercial Property Ltd v Barnett

The facts

- Claimant granted a mortgage of the property to State Securities Plc
- DCC went into administration

Devon Commercial Property Ltd v Barnett

The facts

- DCC's administrators sold the business and assets to Aston Manor Brewery Co Ltd, granted a licence to Aston Manor to use the leased land
- State assigned the mortgage to Aston Manor

Devon Commercial Property Ltd v Barnett

The facts

- December 2009 – Claimant defaulted on the interest payments under the mortgage, Aston Manor served a default notice and appointed the defendants as LPA Receivers
- £3.4m secured by the mortgage

Devon Commercial Property Ltd v Barnett

The facts

- February 2010 – defendants surrendered the lease, granted a new lease to Aston Manor for 3 years
- Receivers marketed the property

Devon Commercial Property Ltd v Barnett

The facts

- December 2010 Asphaltic Ltd made an offer of £4.3 million for the Property subject to vacant possession within 6 months

Devon Commercial Property Ltd v Barnett

The facts

- 25 May 2011 a sale of the Property was completed to Aston Manor Freeholds Limited (a newly formed subsidiary of Aston Manor) for £2.75 million excluding VAT
- No surplus returnable to the claimant

Devon Commercial Property Ltd v Barnett

The claimant's submission

- Duty of good faith
- Duty to exercise powers for the purpose of securing repayment of the debt and not for any other people
- Duty not to put themselves in a conflict of interest

Devon Commercial Property Ltd v Barnett

Issues raised:

- Not unusual for a mortgagee to be involved in a similar industry to the mortgagor e.g. breweries and pubs
- Very usual for the LPA Receiver to take advice from the mortgagee's lawyers

Devon Commercial Property Ltd v Barnett

Issue 1: burden of proof

- Sale by mortgagee to connected party, the burden is on the mortgagee to prove the price paid was the best price reasonably obtainable
- Does the same apply to sales by receivers?

Devon Commercial Property Ltd v Barnett

Issue 1: burden of proof

- Receiver exercising the power of sale under the mortgage owes the same equitable duty to the mortgagor as is owed by the mortgagee

Devon Commercial Property Ltd v Barnett

Issue 1: burden of proof

- Where a receiver sells to a company in which he or she has an interest, this therefore puts the burden on the receiver to show that he or she took reasonable care to obtain the best price reasonably obtainable

Devon Commercial Property Ltd v Barnett

Issue 1: burden of proof

- BUT – the receiver and the mortgagee are two persons
- If selling to an associate of the mortgagee, there is no self-dealing

Devon Commercial Property Ltd v Barnett

Issue 2: Did the defendants' duty of good faith require them (a) to exercise their powers only for the purpose of securing payment of the debt owed to the mortgagee, (b) for no other purpose or independent and conflicting interest of the mortgagee, (c) not to place themselves in a position of conflict or potential conflict of interest?

Devon Commercial Property Ltd v Barnett

Content of duty of good faith:

- Duty of good faith owed by a receiver to the mortgagor must involve intentional conduct amounting to more than mere negligence, and encompassing either an improper motive or an element of bad faith, but it need not amount to dishonesty

Devon Commercial Property Ltd v Barnett

Content of duty of good faith:

- A receiver has no right to remain passive
- He or she must be active in the protection and preservation of the charged property

Devon Commercial Property Ltd v Barnett

Content of duty of good faith:

- Receiver is not managing the mortgagor's property for the mortgagor's benefit, but instead is managing the mortgagee's security for the benefit of the mortgagee

Devon Commercial Property Ltd v Barnett

Content of duty of good faith:

- Mortgagor's and mortgagee's interests conflict from the outset
- Receiver usually bound (in exercising powers for a proper purpose) to prefer the interests of the mortgagee

Devon Commercial Property Ltd v Barnett

Content of duty of good faith:

- Mortgagee cannot buy at all
- An associate can only buy safely where it proves that the sale was in good faith and the mortgagee took reasonable care to obtain a proper price at the time

Devon Commercial Property Ltd v Barnett

Content of duty of good faith:

- Receiver selling to mortgagee's associate – no self-dealing, receiver does not have the same interest in minimising the price
- Receiver in such a case does not have a conflict of interest

Thank you for attending

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Thank you for listening!

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