# DEFENCES TO MORTGAGE POSSESSION CLAIMS

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1. This paper attempts to give an overview of some of the defences which might be raised to a mortgage possession claim. It is expressly intended to be a practical guide, and not an exhaustive account of the law in any of the areas covered. The range of possible defences to a mortgage possession claim is wide and varied. As with many areas of property law, equity, the law of contract and land law – particularly the rules applying to registered land – intersect to create a potentially complex web of issues.

2. It is clear from the statistics in the press that there is a marked difference between the number of possession actions commenced, and the number of possession orders made, whether or not they are suspended on terms. In many cases, that difference can be explained by the range of practical solutions that are struck: renegotiating the terms of the mortgage, or redeeming through sale or remortgage to another more accommodating lender. In other cases, the possession action may fail because of some procedural defect where it becomes apparent to the lender that it is better to give up and try again.

3. So far as substantive defences to possession claims are concerned, the starting point is the general rule that, subject to contractual or statutory limitations, a mortgagee under a legal charge is entitled to seek possession of the mortgaged property at any time after the mortgage is executed. That is an incident of the estate vested in him, and is not dependent on fault:[1]

[1] *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317, per Harman J at 320. The entitlement to possession is an essential incident of legal ownership of the charge, and is not lost by a lender disposing of the equitable interest in the mortgage: *Paragon Finance plc v Pender* [2005] 1 WLR 3412 (CA)

> ... the right of the mortgagee to possession in the absence of some contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right. He has the right because he has a legal term of years in the property or its statutory equivalent. If there is an attornment clause, he must give notice. If there is a provision that, so long as certain payments are made, he will not go into possession, then he has contracted himself out of his rights. Apart from that, possession is a matter of course.

4. That said, most mortgages will expressly or impliedly restrict the right to possession to cases where the tenant is in default.

5. The final comment to make by way of introduction is that the mortgagee is entitled to take peaceable possession without a court order: *Ropaigealach v Barclays Bank plc* [2000] QB 263. However, in almost all cases that will be a dangerous strategy. If "violence" is used to secure entry when someone opposed to the entry is present on the premises, the mortgagee may face criminal liability.[2] Therefore possession without a court order is a risky business, which should only normally be undertaken where the borrower hands back the keys and invites the lender to take the property.

6. Turning then to the possible defences which may be raise to a possession claim, this paper will address two different types of defence. The first, which might be described as defences relating to defects in the security, are capable of being absolute defences to possession.[3] The second, which relate to the statutory discretion of the courts, regulate rather than deny the inherent right of possession.

Defective securities

[2] Criminal Law Act 1977, s 6(1). "Violence" may be against a person or against the property itself (s 6(4)(a)).

[3] I do not attempt to deal with the law of consumer credit and other statutory regulation in the Consumer Credit Act 1974 and the Financial Services and Markets Act 2000. The provisions are complex and cannot be properly addressed in the limited space available.

7. This paper will address two typical "defective security" issues: problems with registration, and undue influence.

(i) *Problems with registration*

8. As the creation of most mortgages will trigger first registration of any unregistered land,[4] in all but exceptional cases the mortgagee will be seeking possession of registered land. The first question, therefore, is whether the claimant is the proprietor of a registered charge over the land. This is something which those acting for lenders should check before commencing proceedings; problems with registration (such as non-registration, or the wrong name of the borrower showing on the official copy) can be more easily cured through HM Land Registry rather than in possession proceedings.[5]

9. One particular problem which may arise at the Land Registry concerns the registered proprietor of the freehold. What happens when a lender advances money to X, the registered proprietor of the land, and registers a charge over the property only to find that X should not be the registered proprietor? The issue arose in *Barclays Bank plc v Guy* [2008] EWHC 893 (Ch). Mr Guy alleged that a transfer of his property to Ten Acres Ltd had been fraudulently procured and registered by Ten Acre. Barclays had later advanced substantial sums to Ten Acres, secured in part by a charge over the land which Mr Guy alleged should have been registered in his name. Assuming his allegations were correct, Mr Guy would have been entitled to rectification of the register. Barclays sought a declaration that it was entitled to sell the property to enforce the security. Its primary submission was that, even if the transfer of the property had been fraudulently procured Ten Acre, it did not affect its rights as the proprietor of a registered charge. Mr Guy argued that the register should be rectified to substitute his name for that of Ten Acre, and to delete the Barclays charge.

[4] Land Registration Act 2002, s 4(1)(g)

[5] A charge does not operate at law until the relevant registration requirements are met: s 27(1) LRA 2002

10. One might have thought that this type of problem could be easily answered with the new found clarity of the scheme of land registration in the Land Registration Act 2002. *Ruoff & Roper – Registered Conveyancing* had helpfully given an example of the application of the post-LRA 2002 rectification rules which was almost entirely on point for *Barclays Bank v Guy*[6]:

> R1 is the proprietor of a registered freehold estate in land. R2 forges R1's signature on a form of transfer and is registered as the new proprietor of the estate. R2 then grants a legal mortgage charge over the land to M1, which is duly registered. R1 applies for rectification so that R2's may be removed from the proprietorship register and his own name replaced, and the charge to M1 deleted from the charges register.
>
> The registrar will rectify the proprietorship register against R2, as in Example 1.1 above. He will not rectify the charges register against M1. R1 will hold the freehold estate subject to M1's charge.
>
> The legal estate is "deemed to be vested" in R2 when he was registered as its proprietor, even though it would not otherwise have vested in him owing to invalidity of the purported disposition from R1 to R2. No special significance attaches to the use of the expression "deemed to be vested", which in this context simply means that the estate is actually vested in R2. The consequence is that R2 had full owner's powers of disposition over the estate, including the power to grant the mortgage charge to M1, since he was the registered proprietor. His powers of disposition remained unqualified so long as his registration as proprietor remained effective. It cannot be said therefore that the disposition by way of legal mortgage to M1 was in any way invalid, nor that the registration of that mortgage was a mistake. Accordingly, R1 has no right to have the register rectified as against M1. R1 could have prevented this result by applying to the registrar to enter a restriction on R2's powers of disposition as soon as he discovered that a forgery had taken place. R2

[6] At paragraphs 46.028 onwards

could be restricted from making a registered disposition of the estate without the consent of the court or registrar.

This result is different from what would have been happened with unregistered conveyances, where the title of R2 and M1 would have depended on the *rule nemo dat quod non habet*. It also differs from what might have been the result under the rectification provisions of the former Land Registration Act 1925 . Under that Act, there was equivocal authority that rectification would have been ordered against a third party transferee or chargee of an registered estate, where the original disposition which transferred the estate was void. The power to rectify would exist, though the court, in its discretion, might refuse to exercise it. One of the reasons for this result was the courts' wish to achieve by rectification the same result as would have followed according to the principles of unregistered conveyancing.

It is submitted, however, that this approach is not justifiable under the 2002 Act. First, it was the explicit policy of HM Land Registry and the Law Commission in the consultation paper that preceded 2002 Act that, in the absence of some error on the register, the principles of unregistered land should not determine whether the register should be rectified. Any other result would undermine the general aim of the Act that the register should indicate accurately and comprehensively the state of the registered proprietor's title. A registered proprietor cannot be deemed to lack powers of disposition which the fact of registration indicates that he actually has. Secondly, the 2002 Act has narrowed the grounds of rectification provided in the 1925 Act so that it no longer allows rectification where the proprietor of a legal estate would not have been the estate owner if the land had been unregistered. The applicant for rectification must prove some error in registration

11. Terence Mowschenson QC, sitting as a Deputy High Court Judge, approved that passage and held that Barclays was entitled to its declaration. His lordship found that, if Mr Guy had registered a unilateral notice against the title, Barclays' security

would be subject to Mr Guy's right to rectify. But, absent such a notice, Barclays was entitled to rely on the register:[7]

> ... whether or not the banks carried out due diligence is not an issue I can resolve today, but, in any event, the banks owe no duty to Mr Guy to lend responsibly... When they came to lend money and to obtain their charge they were entitled to look at the proprietorship register at the Land Registry and take it at face value. The whole purpose of the register is that one does not have to make enquiries and go behind it. I am unaware of any banking practice in which a bank would go behind a register. I had understood it to be trite law that the best evidence is the entry on the register.

12. The Court of Appeal refused permission to appeal: [2008] 2 EGLR 74. Unfortunately for lenders, that is not the end of the matter. HMLR's position is that *Ruoff & Roper* (and, seemingly, the Deputy Judge and the Court of Appeal) is wrong on this point. HMLR's view appears to be that they will rectify the register so as to remove the innocently registered charge as well as the fraudulently registered entry in the proprietorship register.

13. That may be a good practical solution in many cases, given that it is likely that the HMLR's indemnity policy will have to be relied on by one or other party, and a lender is more likely to be interested in compensation rather than taking possession of the land. The problem for the lender is that a payment under the indemnity is unlikely to made if the lender failed to take reasonable care in lending the money. If it would have been obvious to a reasonably careful lender that the person to whom they were advancing the money may not be entitled to be the registered proprietor, HMLR may be unwilling to fully compensate. Alternatively, they may insist that the lender first shows that it has taken all possible steps to trace the fraudster and sue him for the contractual debt. It seems unlikely that *Barclays Bank v Guy* will be the last word on the matter.

[7] At [32]

*(ii)* *Undue influence*

14. Questions of undue influence arise most commonly[8] where a legal or beneficial co-owner, or a third party guarantor, is involved in a transaction. The law of undue influence in the context of mortgage transactions requires the court to ask the basic question whether it can be said that the legal owner of the property, or the beneficial co-owner, participated in the mortgage transaction "with her eyes open so far as the basic elements of the transaction are concerned".[9] For the purposes of defending a possession claim by the lender, the question for the co-owner or guarantor is whether the impropriety amounting to undue influence entitles them to have the mortgage or guarantee set aside *as against the lender* as opposed to just against the other co-owner or principal debtor.[10]

15. Conduct which may give rise to a defence of undue influence is conduct which might mislead or coerce a person into entering into a transaction.[11] It is conduct arising out of "a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person takes unfair advantage".[12] Where the transaction is tainted by such conduct, a court may set it aside regardless of whether the parties would have entered into the same agreement without that conduct,[13] and regardless of whether it was disadvantageous to the person.[14]

[8] At least in the reported cases

[9] *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773, per Lord Nicholls at [54]

[10] See for example *CIBC Mortgages plc v Pitt* [1994] 1 AC 200 as a good example of undue influence vitiating the transaction as between husband and wife, but not as between the bank and wife.

[11] *Etridge (No 2)* at [3]

[12] *Etridge (No 2)* at [8]

[13] *UCB Corporate Services Ltd v Williams* [2003] 1 P&CR 12, per Jonathan Parker LJ at [89]

[14] *Etridge (No 2)* at [11]. Of course, if there is no disadvantage there is unlikely to ever be a dispute.

16. Undue influence may be actual (e.g. through proof of threats) or presumed (e.g. in a relationship such as between a solicitor and his client). There is no automatic presumption of undue influence of a husband over his wife, but in certain circumstances undue influence will be readily inferred by a court.[15] A wife, or another beneficial or legal co-owner, must show that:[16]

> First, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant. Second, that the transaction is not readily explicable by the relationship of the parties.

17. The court will then assess whether the transaction can be explained rather than inquiring further into the effect of that relationship on the parties in the context of the particular transaction. From the perspective of defending mortgage possession claims, the point is that there is a relatively low hurdle for a defendant spouse or guarantor to jump before the court will turn to the claimant to demonstrate that the mortgage transaction should stand. Mortgagees can, however, take comfort from the guidance given by the House of Lords in *Etridge (No 2)*, which gives a protocol to follow to ensure that the mortgage transaction is not vitiated by undue influence:[17]

> The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned.

[15] *Etridge (No 2)* at [19]

[16] *Etridge (No 2)* at [21]

[17] *Etridge (No 2)* at [54]

18. In summary, the following steps must be taken:[18]
    a. A direct approach from the lender to the surety/co-owner requesting the nomination of a solicitor;
    b. A response from the surety/co-owner;
    c. Disclosure of the details of the transaction; and
    d. A face-to-face meeting between the surety/co-owner and the nominated solicitor.[19]

19. If those steps are not taken by the lender, it is deemed to have notice that the transaction may have been procured by undue influence. If the steps have been complied with, an undue influence defence is unlikely to succeed.

Statutory discretion of the court

20. As noted above, the discretion of the court to suspend possession is not, strictly speaking, a defence to a possession claim. There is no jurisdiction to suspend possession *sine die*.[20] What does exist is a limited discretion, in section 36 Administration of Justice Act 1970 in the following terms:[21]

> (1) Where the 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, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below 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 consisting of a breach of any other obligation arising under or by virtue of the mortgage.

[18] Borrowing the helpful classification in *Elements of Land Law* (5th Ed, OUP 2009) by K Gray & SF Gray

[19] It is not enough to assume that proper legal advice has been given: *UCB Corporate Services Ltd v Williams* [2003] 1 P&CR 12

[20] *Royal Trust Co. of Canada v Markham* [1975] 1 WLR 1416

[21] Emphasis added

(2) The court—

(a) may adjourn the proceedings, or
(b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may—

(i) stay or suspend execution of the judgment or order, or
(ii) postpone the date for delivery of possession,

for such period or periods as the court thinks reasonable.

(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.

(4) The court may from time to time vary or revoke any condition imposed by virtue of this section.

21. For the purposes of exercising this discretion, where there is an agreement to pay by instalments or to defer payment, the court may treat as due at the date of the possession hearing only those sums which would have been paid if there had been no provision for early repayment upon default or upon demand (s 8(1) Administration of Justice Act 1973). There is extensive case law on the exercise of the s 36 discretion:

    a. Simply asking for time from the court is not enough. There must be realistic prospect of payment of the arrears: *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, per Lord Wilberforce at 509. The likelihood of repayment is a question of fact for the judge on the evidence before him and in the absence

of evidence the discretion should not be exercised: *Royal Trust Co of Canada v Markham* [1975] 1 WLR 1416, per Sir John Pennycuick at 1422;

b. The starting point for calculating a "reasonable period" for repayment of arrears is the entire remaining term of the mortgage: *Cheltenham and Gloucester v Norgan* [1996] 1 WLR 343;

c. The discretion will not be exercised if it would put the lender's security at risk, and expert evidence may be required to demonstrate this: *Cheltenham and Gloucester v Norgan* [1996] 1 WLR 343, per Waite LJ at 354;

d. The court may exercise its discretion where there is a prospect of the borrower securing a sale of the property which will satisfy the mortgage debt. "Is there a prospect of an early sale? If so, is it better in the interests of all concerned for that to be effected by [the mortgagor] or by the mortgage company? If the view is that the prospects of an early sale for the mortgagees as well as for [the mortgagor] are best served by deferring an order for possession, then it seems to me that that is a solid reason for making such an order" (*Target Home Loans Ltd v Clothier* (1993) 25 HLR 48, per Nolan LJ at 55). However, the discretion should not be exercised when the delay in securing a sale will inevitably result in a shortfall: *Cheltenham and Gloucester plc v Krausz* [1997] 1 WLR 1558;

e. The discretion will seldom be exercised to allow the mortgagor to remain in possession pending a sale by the mortgagee, unless it can be shown that there is no need for earlier possession, there would be no effect on the sale price and the mortgagor will co-operate in effecting the sale: *Cheltenham & Gloucester BS v Booker* (1996) 73 P&CR 412;

f. The discretion may be exercised in respect of a default in respect of "any other obligation", but only if that default is capable of being remedied: *Britannia Building Society v Earl* [1990] 1 WLR 422, per McCowan LJ at 430.

22. For those defending possession proceedings, it is plain that s 36 *should* only assist the cooperative borrower who makes genuine and realistic proposals (supported by evidence, perhaps given orally) to pay the arrears. In reality, some judges exercise the discretion generously to borrowers, perhaps adjourning for short periods on the basis of little evidence to allow concrete proposals for sale or refinance to be brought forward. Section 36 gives a classic judicial discretion, and it is often difficult to predict on a given set of facts how it will be exercised.

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