MORTGAGES AND LEASES

Introduction

1. This talk aims to give a practical guide to issues surrounding the enforcement of security over property which is, or is alleged to be, tenanted by a third party. What difficulties might the mortgagee, usually a bank ("the Bank") and or its Receivers encounter and what should they do to best protect the security?

2. It should not necessarily be assumed that the Bank views the existence of a tenancy as a "bad thing". It rather depends upon what terms the property is let. If the mortgaged property is a warehouse, let to a good tenant at an open market rent (or even better an over rentalised position) that will enhance the value of the reversion as an investment ☺. In that type of situation the Bank might be rather keener to ensure that the Mortgagor does not take action leading to the tenant vacating, such as purporting to accept a surrender.

Basic Legal Principles

3. In simple terms, a Bank will be bound be a tenancy if:

   (i) It was granted before the charge so as to have priority over it;
   (ii) It was granted under express powers of leasing in the Legal Charge;
   (iii) It was granted under statutory powers of leasing, which have not been excluded; or
   (iv) The Bank has acted in some way as to accept the tenant as its own

Tenancy granted before the Legal Charge

4. Absent an estoppel to the contrary binding the tenant[1], the Bank will be subject to a tenancy granted before the legal charge[2].

5. Under section 29(2) and Schedule 3 to the Land Registration Act 2002, a mortgagee's registered charge will be subject to "a leasehold estate in land for a term not exceeding seven years from the date of grant" (para. 1), or to "the interest belonging at the time of the disposition to a person in actual occupation, so far as relating to the land of which he is in actual occupation" (para. 2). A registered lease of over seven years will take priority over the charge in the usual way (s.29(1)).

Tenancies granted simultaneously with the Legal Charge: Leaseback schemes

6. One of the types of situation that we are seeing more regularly now and having to advise upon in the mortgage context are "lease back schemes".

7. Whilst no doubt there are totally legitimate businesses in the market operating bona fide "leaseback schemes", it appears that some mortgagors who find themselves in financial difficulties are being exploited by rather unscrupulous operators who seek to buy the property at an undervalue (usually sufficient to pay off the vendor's existing mortgage) on the basis of either a deferred payment and or promises of a tenancy that will secure the continued right to occupation. Any such "product" has great "miss-selling" potential in that people are led to believe that their right to remain in their home is preserved. Whilst promises may be made that they are secure in their possession until they can make the deferred payments, in the main they are granted only assured shorthold tenancies, which offer little real protection. Further they may be unaware of the involvement of a further lender against whom they are unlikely to be able to enforce the arrangement.

[1] As to which see *Skipton Building Society v Clayton* (1993) 66 P & CR 223; *Woolwich Building Society v Dickman* [1996] 3 All ER 204.
[2] *Moss v Gallimore* (1779) 1 Doug KB 279 at 283

8. In some cases we have seen the purchaser takes out a new mortgage, often in the name of a nominee, but Bank 2 is unaware of the "side arrangement" or "promises" made to the occupying vendors. The purchaser may even purport to grant the "vendors" a tenancy to take effect on or before the sale. The purchaser then defaults on the mortgage. The vendor/ tenants then appear to set aside a warrant. It is then contended that Bank 2 takes subject to the tenancy.

9. Obviously the vendor cannot grant a lease to himself at a time when he remains the owner. However a tenancy granted by the purchaser before the sale, would be effective, albeit only in equity as a tenancy by estoppel between the vendor and the purchaser, the estoppel being "fed" on completion of the transaction and thereafter treated as legal from grant. Therefore such a tenancy will bind a mortgagee of a charge granted after completion of any such leaseback arrangement.

10. However in these cases, the Bank's charge is executed simultaneously with the purchase that feeds the estoppel. In the battle for priority, who wins? On current authority the Bank would not be bound by the tenancy. This is due to an application of *Abbey National BS v Cann* [1991] 1 AC 56[3] where it was held that in such cases, namely where the charge is to secure the purchase monies, the two elements of the transaction are indivisible in time such that the legal estate never vests in the purchaser free from the charge and so a tenancy that only takes effect when the legal estate so vests will rank below the charge in order of priority. Lord Oliver said this of the "scintilla temporis" doctrine at 92F-93B,

> "*Nevertheless, I cannot help feeling that it flies in the face of reality. The reality is that, in the vast majority of cases, the acquisition of the legal estate and the charge are not only precisely simultaneous but indissolubly bound together. The acquisition of the legal estate is entirely dependent upon the provision of funds which will have been provided before the conveyance can take effect and which are provided only against an agreement that the estate will be charged to secure them. Indeed, in*

[3] *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381.

many, if not most, cases of building society mortgages, there will have been, as there was in this case, a formal offer and acceptance of an advance which will ripen into a specifically enforceable agreement immediately the funds are advanced which will normally be a day or more before completion. In many, if not most, cases, the charge itself will have been executed before the execution, let alone the exchange, of the conveyance or transfer of the property... The reality is that the purchaser of land who relies upon a building society or bank loan for the completion of his purchase never in fact acquires anything but an equity of redemption, for the land is, from the very inception, charged with the amount of the loan without which it could never have been transferred at all and it was never intended that it should be otherwise."

11. This was also the case in *Hardy & ors v Fowle* [2007] EWHC 2423 where the defendants claimed priority over the Bank under a 30 year lease granted to D2's grandparents, which it was claimed (unsuccessfully) had vested in the Ds. The grandparents in question had originally owned the property known as Trelan in Cornwall but had transferred it to their only son, albeit that they remained living there. The son thereafter died and the property vested in his estate. His two daughters were the beneficiaries. The estate sold the property to a family company set up for the purpose. It was part of the "arrangement" that the company would on completion grant a 30 year term at a nominal rent to the grandparents to protect their right to remain in the property for the remainder of their lives. The Bank did not know about this part of the transaction. After the grandparents' death Ds sought to argue that the Lease had become vested in them and took priority over the Bank's charge. Those arguments were rejected. The deputy judge (John Randall QC) held that on the facts the Lease had in fact been terminated by notice on its own terms. So the remainder of his judgment is obiter. However, he held that in any event the Lease would not have bound the Bank, applying *Abbey National v Cann*. He rejected a submission that *Cann* should be distinguished because there were 3 different transactions, not simply 2. As the judge pointed out, the introduction of a third transaction necessarily

raises an issue as to the priority between the two different grants made by the purchaser and there cannot in law be a "dead heat" between them.

12. The case also offers considerable comfort to banks on the question as to whether it is appropriate to attribute knowledge of the purchaser's solicitors to the Bank. In that case the solicitor (who was also acting for the Bank) knew of the arrangement but did not tell the Bank. The Bank knew that the grandparents were living at the property and that they would continue to live at the property but it knew nothing of the proposed Lease. It was held that the solicitor's knowledge could not be imputed to the Bank so that the Bank cannot be said to have agreed to the arrangement, because the solicitor was only instructed, for the Bank, in relation to the charge. It was held that the Bank had not done anything to "*clothe the solicitor with ostensible authority to agree on its behalf to any other or different transaction*"[4]. The solicitor's role is, ordinarily, essentially ministerial.

13. Likewise it was held that the Bank was not put on notice under s.199 of the LPA 1925 (this was unregistered conveyancing), which provides as follows:

> *"(1) a purchaser shall not be prejudicially affected by notice of - .... (ii) any other instrument or matter or any fact or thing unless - ... (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such or his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent*".

John Randall QC held that the Bank was not on notice of the Lease under this provision. The knowledge of the true nature of the transaction had come to the solicitor as agent of the vendors. When he was subsequently instructed by the Bank, the information could not be treated as having come to his knowledge again for knowledge cannot be treated as divided or disposed of in this way. Therefore the

[4] Official transcript at para 105.

solicitor's knowledge had not come to him "as such", namely as solicitor for the Bank, as opposed to the vendors.

14. Finally the judge held that, even if the Lease had been binding on the Bank, had vested in Ds and had not been terminated (lots of "ifs"), the Ds would have been estopped from relying on the Lease in answer to Bank's claim to possession. Quite simply the Ds had signed a letter, several years after the charge, acknowledging that they had no right to occupy vis-a-vis the Bank and would immediately vacate the property if required to do so. The Bank had continued to lend on this basis and therefore Ds would in any event have been estopped from setting up the Lease in answer to the Bank's claim.

15. Another point to watch out for in relation to registered land is the "registration gap". If a registered proprietor grants a charge and subsequently grants a legal tenancy in the period between the grant of the charge and its completion by registration, the tenancy will bind the Bank: see *Barclays Bank Plc v Zaroovabli* [1997] Ch 321.

Leases granted after the Legal Charge

16. Section 99 of the Law of Property Act 1925 gives the mortgagor (in relation to mortgages granted after 31 December 1881) statutory power to grant leases binding against the mortgagee. However, this power is subject to any contrary intention expressed in the mortgage deed or otherwise in writing. Section 99 provides, in part, as follows:

> *99.— Leasing powers of mortgagor and mortgagee in possession.*
>
> *(1) A mortgagor of land while in possession shall, as against every incumbrancer, have power to make from time to time any such lease of the mortgaged land, or any part thereof, as is by this section authorised.*

(2) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have power to make from time to time any such lease as aforesaid.

(3) The leases which this section authorises are—

(i) agricultural or occupation leases for any term not exceeding twenty-one years, or, in the case of a mortgage made after the commencement of this Act, fifty years; and

(ii) building leases for any term not exceeding ninety-nine years, or, in the case of a mortgage made after the commencement of this Act, nine hundred and ninety-nine years.

(4) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute within that time, on the land leased, an improvement for or in connexion with building purposes.

180 Fleet Street, London, EC4A 2HG | DX:1042 (LDE) | t.020 7430 1221 | f.020 7421 6060 | e.clerks@landmarkchambers.co.uk

(10) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee, but the lessee shall not be concerned to see that this provision is complied with.

(12) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13) [Subject to subsection (13A) below, t]1 his section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and has effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

17. Where the power of leasing is to be conferred, it is not unusual to find that the Legal Charge extends the statutory powers by removing some of the limitations in s.99.

18. As to tenancies purportedly granted after the respective charges, Banks' standard conditions often expressly exclude or restrict the power of leasing in a clause such as the following:

"*The Chargor will not without the prior written consent of the Bank:*

(a) grant or accept the surrender of any lease or tenancy of all or part of the Property whether under the powers given by Sections 99 and 100 of the Law of Property Act 1925 or otherwise"

19. In the case of buy to let mortgages, it is usual to find some limitations on lettings, even though lettings are envisaged. For example, that any letting must be on an AST basis. Therefore if acting for a Bank or Receiver always check the terms of both the Legal Charge and the Bank's Conditions to see if the power of leasing is excluded or otherwise limited.

20. If any Lease was granted in breach of the terms of the Legal Charge, it will be void against the Bank[5], although it will subsist by estoppel between the mortgagor and the lessee. Such a lessee is liable to be ejected without notice by the Bank: *Dudley and District Benefit BS v Emerson* [1949] Ch 707; *Taylor v Ellis* [1960] Ch 368.

21. If a Bank does consent in writing to the grant of any tenancy post dating the charge, it will be bound by it. This is so whether the Bank was a party to the transaction or whether it merely consented after the event.

22. Further, where the statutory power of leasing is expressly excluded the mortgagee will not be bound by any lease or tenancy granted after the date of the legal charge unless it has consented to it or has acted in such a way as to treat the tenant as his own. The principle was explained by Cross J in *Stroud Building Society v Delamount* [1960] 1 All ER 749 at 751 as follows:

> " *When a mortgagor has granted a tenancy which is not binding on the mortgagee the latter can, instead of treating the tenant as a trespasser, consent to treat him as his own tenant or he may act in such a way as precludes him from saying that he has not consented to take him as a tenant. Such an acceptance by the mortgagee of the mortgagor's tenant, whether express or implied, or operating by way of estoppel, must, I think, amount to a creation of a new tenancy between the parties. The tenancy between the mortgagor and the tenant is not one which is merely voidable by the mortgagee if he chooses not to accept it, but which he can confirm by waiving*

[5] *Keech v Hall* (1778) 1 Doug. DB 21

his right to avoid it. It is a nullity as against the mortgagee and so, if the mortgagee is to lose his right to treat the mortgagor's tenant as a trespasser, it must be because the tenant has become the mortgagee's tenant under a new tenancy"

23. Banks often prefer to appoint LPA receivers to enforce the security rather than taking possession. This is because the LPA receiver acts as a statutory deemed agent for the mortgagor under section 109(2) of the LPA 1925. Therefore the Bank does not take on the usual liabilities associated with taking possession of the property.

24. However, this can cause difficulties where a third party pops up and claims a tenancy effective as against the mortgagor. Even if the Bank is not bound the Receiver, as agent of the mortgagor, will be. Particular care has to be taken to ensure that the Receivers do not in any way prejudice the Bank's title paramount by doing acts that are seen to be the acts of acceptance on behalf of the Bank.

25. The acts of the Receivers as such will not be treated as the acts of the Bank itself since, as I have set out above, the Receivers act as agent of the mortgagor and not the mortgagee. For this reason mere acceptance of rent by a Receiver will not by itself amount to an acceptance of the tenant by the mortgagee: see *Stroud Building Society v Delamount* [1960] 1 All ER 749*; Chatsworth Properties Ltd v Effiom* [1971] 1 All ER 604*; Nijar v Mann* (1998) 32 HLR 223.

26. Whilst the acts of the receiver will not in themselves amount to the acts of the mortgagee, it has been held in all three cases cited above that a mortgagee may by its own acts be treated as having accepted a tenant during the course of receivership. In every one of those cases, the mortgagee was held to be so bound.

27. Even the slightest interaction with the tenant (or even third parties) may suffice to bind the mortgagee. For example in *Chatsworth Properties Ltd v Effiom* the

mortgagee was held bound by virtue of a letter written by its solicitors to the occupier in the following terms,

"*Please take notice that henceforth you should pay any sums to your former landlords [the mortgagors] henceforth to the receiver.*"

It was held that the form of wording of the letter would have been understood by the tenants as the plaintiff notifying them that it was their new landlord.

28. In *Nijar v Mann*, the mortgagee bank had been aware from the time of the legal charge that the mortgagor intended to convert the property into units to be let, even though the charge had an absolute prohibition against letting. The mortgagee sold to a third party and during the course of correspondence indicated to the buyer that the property was tenanted. Indeed in the contract for purchase the purchaser confirmed in writing that it was aware that the property was subject to tenancies. The property was sold subject to certain matters including tenancies (if any). On the evidence it was held that the bank considered itself liable to pay the electricity board in respect of the premises. In addition the LPA receiver acted directly on instructions given by the bank's solicitors in relation to rent collection. It was held that the mortgagee bank had accepted the tenant. This case demonstrates the width of the potential documentation that might be analysed by the court in deciding whether the mortgagee treated the tenant as its own.

29. In practice Receivers often take their instructions from the appointing bank and during the course of dealings the Bank might have acted in a way consistent only with it having accepted the concession and treated the occupier as tenant.

Practical Considerations

30. It is important to appreciate right from the outset that the position is likely to differ depending on whether the Bank intends to enforce its security by (i) taking possession; (ii) exercising its statutory powers of sale; (iii) by appointing a receiver under the Law of Property Act 1925.

31. Further its strategy is likely to depend on the nature of the tenancy alleged to bind the Bank and whether it is a good thing ☺**!**, a tad inconvenient ☹ or truly nasty ☹☹**.**

32. Banks tend to prefer to enforce security via a Receiver, particularly in "complicated cases" because the LPA Receiver, in realising the security, acts as agent of the mortgagor. Therefore the Bank can enforce its security without incurring the liability of a mortgagee in possession.

33. If the Mortgagor has granted a tenancy in breach of the terms of the charge, then although that tenancy will not bind the Bank, it will bind the Mortgagor. An LPA Receiver, although appointed by the Bank, merely stands in the shoes of the Mortgagor and acts as its agent. Therefore if the tenancy binds the Mortgagor, it will also bind the Receiver, even though the Bank is not bound.

34. In straightforward cases, this does not present a big problem. Imagine that a Mortgagor has, in breach of a house purchase mortgage, let the property on an AST. The AST (a tad inconvenient ☹) may well be terminable in short order (2 months' notice) by the service of a s.21 notice. The LPA Receiver can serve such a notice in the name of the Mortgagor (and subsequently issue proceedings if necessary) and probably more quickly than it would take the Bank to change tack and seek possession so as to acquire vacant possession that way. This is particularly so if the tenant might seek to contend that the Bank had in fact treated him as his own in any event. If matters were spun out in that way, the Bank might be faced with having to defend such allegations. If it took possession subject to such rights, it could only effectively serve a s.21 notice from the date possession is ordered against the Mortgagor and so would have to wait even longer to secure vacant possession.

35. However, the position might be very different if the tenancy in question is a "truly nasty" one that depletes the value of the security. For example, a purported long term at peppercorn rent with no repairing obligations ☹☹**!**

Defeating lease by asserting title paramount in possession proceedings

36. If that is the case, what can the Bank do about it? It can seek possession as against both the Mortgagor and the third party tenant on the basis that the tenancy does not bind it. This may be much simpler than the Receiver trying to defend the claim on the basis that the mortgagor did not in fact grant such a lease (which may well not be the case).

37. Assuming that possession is sought, it is likely that the possession proceedings will be contested in that the third party "tenant" will apply to be joined into a possession claim defending possession on the basis that he or she enjoys a tenancy binding on the Bank.

38. Provided the tenant's claim is not liable to be struck out, the court is likely to give direction for trial, which can delay the Bank's attempts to realise its security even if the court does eventually find that the tenancy does not bind the Bank. Costs incurred can be added to the security in most cases, but that will be of little comfort if there is negative equity.

39. The tenants often resist a possession order being made against the Mortgagor in order to preserve perceived rights. The court does have power to make such an order against one defendant if an undertaking is given not to enforce the possession order against D1 until the claim against D2 has been resolved: see *Albany Home Loans v Massey* (1997) 29 HLR 902.

40. However I have seen tenants contend that they are independently entitled to an order adjourning or suspending a possession order under section 36 of the Administration of Justice Act 1970. I cannot see how this can be right. If the

mortgagor does not seek such an order, how can the court effectively substitute a new party in its shoes for the purposes of ordering future instalment payments or require the mortgagor to do so. In any event this argument is in my opinion misconceived because if the claim to a tenancy binding on the Bank is successful, the possession proceedings as against the tenants must fail and there is no question of a suspended order being made as against them in any event. They simply do not need this added protection. Of course the "sale" route under s.101 would avoid any such argument: see *Horsham Properties Group Ltd v Clark* [2009] 1 P & CR 8.

41. If a possession order is made against the Mortgagor, or the court is satisfied that the Bank is entitled to possession as against the Mortgagor and makes a declaration to that effect, the Bank should be entitled to some payment from the occupiers for their continued occupation of the premises. If the tenancy is binding, the Bank is entitled to the rent and if not, the Bank is entitled to mesne profits as essentially damages for trespass. In these cases, where the case may take 6 months to a year to come onto trial it is advisable for the Bank to apply under the CPR for an interim payment against the alleged tenant, either to be paid out (where possession is ordered) or paid into court in the meantime. The making of such an order can put pressure on the tenants to settle.

42. It can be important to get a possession order as against the Mortgagor, or at least a declaration that the Bank is entitled to possession. If that happens the Bank is in a position that having notional possession against D1, it can take protective measures against D2, such as by serving "without prejudice" s.21(4) notices to terminate such rights (albeit denied) as the tenant's claim. The Bank will not want to wait until after the trial to exercise such mitigating action if it can do so earlier.

Selling unencumbered by tenancy: s.101 LPA 1925

43. Alternatively the Bank may just assert its "title paramount" in seeking to exercise any express power of sale or the statutory power of sale under s.101 LPA 1925. If it is not bound by the tenancy, then it can give a purchaser good title freed from that.

However, under s.104(1) of the LPA 1925, the mortgagee can only convey the land "*subject to all estates, interests, and rights which have priority to the mortgage*."

44. It has recently been confirmed that the statutory powers of sale under s.101 LPA 1925 do not infringe Article 1 of the First Protocol to the ECHR: see *Horsham Properties Group Ltd v Clark* [2009] 1 P & CR 8.

45. If there is any doubt as to whether or not an alleged tenancy is binding on the Bank (such as where the Bank may have been taken to have accepted the tenant as its own), the Bank could sell the property as it is, leaving the purchaser to take on the burden/ risk of litigation with the occupier as to the status of the lease. If there is any doubt, it would be wise for the Bank to ensure that it gives no warranty that the property is sold unencumbered by the lease, but rather puts the risk on the purchaser. Of course the sale should not be expressed to be subject to the lease though

46. This strategy may carry some risk however in the event that the Mortgagor challenges the price obtained on sale. The editors of Fisher & Lightwood (12th ed.) at 30.26 state that "*when selling tenanted property which would realise a much higher price with vacant possession, the mortgagee should, in appropriate cases, attempt to obtain vacant possession"*. This begs the question of what is an "appropriate case". If the tenant, who has been allowed in by the mortgagor is contending that his tenancy binds the Bank, I cannot see why a Bank, properly advised, cannot assess and account for that risk by selling the property at a price which reflects it. The Mortgagee surely cannot be placed under a duty to commence uncertain and risky litigation to obtain vacant possession first

Appointment of LPA Receivers over tenanted property

47. Let us now assume that there are leases or tenancies that bind the Bank. Many multi-occupied residential buildings are mortgaged on a buy to let basis such that the tenancies of the various flats will bind the Bank whether they were granted before or

after the Legal Charge (subject always to any argument that the type of tenancy granted was a breach of the mortgage terms).

48. It is precisely in these types of cases that the Bank will usually opt for the appointment of an LPA Receiver. However, Receivers in such cases can encounter considerable practicable difficulties in collecting rent and otherwise managing the block with a view to selling on the reversion.

49. The first thing that the Receivers need to do is to notify all of the tenants of their appointment. As far as rent goes, the appointment gives the receiver the right to collect the income from the property, including the rents and other payments due from tenants from and after the date of appointment. However, a tenant can safely continue to pay rent direct to the mortgagor until such time as he is actually given notice of the appointment of the Receiver: see *Vacuum Oil Co. v Ellis* [1914] 1 KB 693. However, if the tenant continues to pay rent to the mortgagor after the date of such notice,that will afford him no defence to the Receivers' claim.

50. The Receivers and Bank need to be very careful not to do any acts that might be deemed to amount to an acceptance of an unlawful tenancy. Unless it is easy to terminate, the Bank would probably be well advised to take possession of any such flat sooner rather than later to avoid the risk.

51. Even if the identity of the occupant of each flat is not known it would be good practice for a letter to be addressed to the occupiers of each flat on a "without prejudice as to status" basis informing them of the appointment, asking them to confirm the basis of their occupation and requesting them to tender future rent (if any) to the Receivers. Often residents are very confused and it is good idea to set up face to face meetings and or at the very least point them in the direction of independent legal advice and or the citizens' advice bureau.

52. The Receivers may well have little knowledge of who is in occupation of each flat, let alone the basis of their occupation or the state of the rent account. In some cases

the Mortgagor might have impeccable records and act cooperatively in handing over all available information. Whilst there will usually be a provision in the legal charge requiring some degree of cooperation, if it is not forthcoming the only remedy is issuing proceedings for specific performance, which would be costly and time consuming and ultimately difficult to enforce.

53. Obviously door to door inquiries by agents appointed by the Receivers are very important to identify who is in occupation of each flat and to get copies of any written documents. If no information is forthcoming, it is a good idea to write informing the occupant that in the absence of any information provided in advance, they are assumed to be a trespasser. Carefully worded trespasser proceedings could be issued on the back of that which will most probably have the desired effect of flushing out information. It is a slightly risky approach but it gets the ball rolling and at least the Bank has a shot at seeking a costs order against the occupier if they subsequently seek to defend on the basis of a tenancy.

54. I have been involved in cases where not only is the mortgagor wholly uncooperative, it is downright obstructive. Mortgagor landlords can be heavy handed and it is not unheard of for them to continue to demand rent directly from the tenants threatening eviction if not paid and giving occupants conflicting accounts of the role of the Receivers. Further the mortgagor might continue to purport to grant tenancies to persons who are totally unaware that a Receiver has been appointed. Obviously any such tenancy will not bind the Receivers.

55. In these circumstances it is possible to apply to the court for an injunction against the mortgagor but it is sensible to try and convince the tenants of the Receiver's right to receive the rent. As a matter of authority, any attempt by the mortgagor to interfere with the receiver's collection of the income will be restrained: see *Fisher & Lightwood's Law of Mortgage (12th ed.)* at 18.10. An injunction will be granted at the suit of the mortgagee to restrain the mortgagor from interfering with the receiver and from receiving rent: see *Bayly v Went* (1884) 51 LT 764.

CAMILLA LAMONT

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Landmark Chambers

180 Fleet Street

London EC4A 2HG

clamont@landmarkchambers.co.uk