

Powers and Duties of Mortgagees, Receivers and Administrators in the Management and Sale of Property

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TABLE OF CONTENTS

Page	
	Mortgagees
4	Right to possession
5	Mortgagee's position when not in possession
6	Mortgagee's position when in possession
	<i>The latitude afforded to the mortgagee and his entitlement to prefer his own interests</i>
7	Timing of sale
8	Method of sale
9	Where it's the mortgagor who wants to sell
	<i>Mortgagee's duties in connection with the power of sale</i>
9	Duty of good faith
10	Duties in addition to the duty of good faith: obtaining true market value
	<i>What does "the duty to take reasonable precautions to obtain the true market value" include?</i>
11	Specific examples of mortgagee's duties
13	Auction sales
13	Limitations to the mortgagees' duties and liability
14	Sale price and the margin of error
	<i>Mortgagee's expert</i>
14	Is the mortgagee's duty discharged if he acts on the advice of an expert whom he has acted reasonably in appointing?
15	Does the mortgagee's expert owe a duty to the mortgagor?
	<i>Mortgagee's duty to get a proper price</i>
15	To whom does the mortgagee owe its duty to get a proper price?

16	Guarantors
16	Bankrupts
16	Burden of proof
16	Measure of compensation
18	Where there is a conflict between mortgagee's interest and duty
18	Set-off
19	Set-off and mortgagee's right to possession
19	Set-off and receiver's misconduct
	<i>Stopping sale by injunction</i>
19	Where contracts have been exchanged
20	Before contracts have been exchanged
	LPA Receivers
20	Comparison with position of mortgagees
21	Duties to mortgagee and to mortgagor
21	Duties arise on appointment
22	Receiver is the agent of the mortgagor
22	Limited consequences of this relationship of agency
23	Receiver's duty of fairness to the mortgagor
	Court appointed receivers
24	Comparison with position of LPA receiver
	Administrators
24	Appointment
25	Objectives
25	Duty to company
26	Court will not appoint unless there is a business to rescue

MORTGAGEES RECEIVERS AND ADMINISTRATORS - AT A GLANCE

	Appointment	Source of power of sale	Source of right to possession	Duties
Mortgagee	N/A	Mortgage Deed and/or LPA 1925 SS 101 (1) (i) and 103	Common law right to immediate possession, whether there is a default or not, <i>Four-Maids Ltd. v Dudley Marshall (Properties) Ltd.</i> [1957] Ch. 317 unless expressly or impliedly excluded and subject, in the case of residential property, to various limited powers of the court to postpone possession.	Equitable, including but not necessarily confined to a duty of good faith to mortgagor and others are interested in the equity of redemption. If in possession, is liable to account for default in management of property and for failure to keep property in a reasonable state of preservation. <i>Halsbury's Laws</i> vol 77, paras 429 – 441.
Receiver appointed out of Court, or "LPA Receiver"	Under mortgage deed or LPA 1925 SS 101 (1)(iii) and 109. Can be appointed under either a fixed or floating charge, but only in the circumstances where the deed so provides.	LPA 1925 S 109 (3)	Delegation by the mortgagee of its powers and LPA 1925 S 109 (3).	Primary duty is to protect mortgagee's interests, but also owes equitable duties, like those of a mortgagee in possession, to anyone interested in the equity of redemption, in particular, mortgagee and mortgagor. Under LPA 1925 S 109 (2) receiver is the agent of the mortgagor. Therefore,

				mortgagee is not liable for Receiver's default unless the mortgagee interfered with the receivership. The existence of this agency, however, does not increase the duties which the receiver owes to the mortgagor. <i>Silven Properties Ltd. V Royal Bank of Scotland Plc</i> [2004] 1 WLR 997
Receiver appointed by the Court. Usually unnecessary to do this in order to exercise rights under a security.	Equitable jurisdiction. In High Court, under Senior Courts Act 1984 S 37; in County Court under regulations made under CCA 1984 S 38. Generally appointed with a view to safeguard property and enable sale of a going concern.	Depends on Court Order. Power of leasing is not usually given and it is unusual therefore to sell property outright.	Depends on Court Order, both for physical possession and for the receipt of rents.	Duties are as officer of the Court. Not deemed to be the agent of any of the parties. Answerable for all money that comes into his hands, or that might have come into his hands but for his own negligence or default.
Administrator of a Company	By Court Insolvency Act 1986 Sched B 1 (added by Enterprise Act 2002) para 10 or by the Company or by the holder of a qualified floating charge – ie a charge over substantially the whole of	IA 1986 S 14 and Sched 1.	IA 1986 S 14 and Sched 1.	Administrator is obliged to pursue a hierarchy of "objectives" the first of which is to rescue the company as a going concern if practicable and if this is the best solution for the creditors. Its

	the Company's property which permits the holder to appoint an administrator, para 14.			duties are owed to the creditors as a whole. IA 1986 Sched B1 para 3. Same duties as those of an Administrative Receiver. Administrators' conduct can be challenged by the Company, a creditor or member under Sched B1 para 74, and claims can be made under para 75 for misfeasance from which the Company has suffered.
Administrative Receiver	Post September 2003 there are almost no circumstances in which an Administrative Receiver can be appointed. Circumstances which would formerly have resulted in such an appointment will now result in the appointment of an Administrator.			The duties are the same as those of an LPA receiver – <i>Bell v Long</i> [2008] 2 BCLC 706, paragraph 13.

Powers and Duties of Mortgagees, Receivers and Administrators in the Management and Sale of Property

1. The purpose of this paper is to outline the duties, and the limits to those duties, which affect mortgagees, receivers (LPA and court appointed), and administrators with regard primarily to the sale of the properties which they hold security. Because the duties of receivers and mortgagees are largely identical – *Silven Properties Ltd. v RBS PLC* [2004] 1 WLR 997, 1006 – the first and largest section will deal with the duties of mortgagees (which also includes citations of cases that actually concern receivers), while the differences will be set out in the smaller section which follows. The role of administrators will be dealt with at the end. Because the views of the judiciary have varied over time, I have included a number of quotations which appear to reflect the current opinion and I have identified a few examples of reported dicta which should now be treated with caution. Because there are now few administrative receivers and because their duties are in any event indistinguishable from those of LPA receivers, they will not be discussed further. **Bold** type is primarily used to enable the topic under discussion to be identified quickly, rather than for purposes of emphasis.

Mortgagees

Right to possession

2. Unless the mortgage expressly or impliedly provides otherwise (e.g. in the case of a fixed sum loan payable by installments for the purchase of a dwelling), the

mortgagee has **the right to possession before the ink is dry** on the mortgage, whether there is a default or not – *Four-Maids Ltd. v Dudley Marshall (Properties) Ltd.* [1957] Ch 317; *Megarry and Wade* para 25-024. In the case of **residential property**, the mortgagee cannot evict the occupier without a court order. In such cases, **the Court can give the mortgagor time** to remedy his default and delay the grant of possession in the meantime under the Administration of Justice Act 1970 S 36 and the A.J.A. 1973 S 8. Note, however that this power does not affect the mortgagee's position where it can lawfully obtain possession without a court order or where he seeks to exercise his power of sale without obtaining possession - *Ropaigealach v Barclays Bank Plc* [2000] QB 263. It also does not avail any mortgagor whose debt can be called in at any time, rather than upon default - *Habib Bank Ltd v Taylor* [1982] 1 W.L.R. 1218.

Mortgagee's position when not in possession

3. The mortgagee is under **no duty to consider any interests other than its own** when deciding whether or not to exercise its rights which it has to take possession or to appoint a receiver.

Regarding the power of sale

“It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes.”

Cuckmere Brick Ltd. v Mutual Finance Ltd. [1971] Ch 949, 965

Regarding the appointment of receivers

“The liquidator says that the appointment of the receiver was unnecessary because he, the liquidator, was doing all that could be done to protect the interests of L.B. and the appointment of the receiver only caused duplication of effort and unnecessary expense. I think that there are two answers to this submission. The first is that L.B. was contractually entitled to appoint the receiver to protect its own interests... It would be no answer that the property could be realised by the liquidator more cheaply and no less effectively. The debenture-holder is under no duty to refrain from exercising his rights merely because to exercise them may cause loss to the company or its unsecured creditors. He owes a duty of care to the company but this duty is qualified by being subordinated to the protection of his own interests. As Salmon L.J. said in *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.* [1971] Ch. 949, 965H: “If the **mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests ...**”

re Potters Oils Ltd. [1986] 1 W.L.R. 201.

“... a mortgagee has no duty at any time to exercise his powers as a mortgagee, to take possession or to appoint a receiver and preserve the security or its value or to realise or exploit his security, e.g. by selling securities before they become valueless. The mortgagee is free to exercise the rights and remedies available to him ‘simultaneously or contemporaneously or successively or not at all.’”

Lightman and Moss, The Law of Administrators and Receivers of Companies, 5th edition, paragraph 13-032

Position when mortgagee is in possession

4. A mortgagee’s position alters greatly if it takes possession of the property.

“If he takes possession he might prefer to do nothing and bide his time, waiting indefinitely for an improvement in the market, with the property empty meanwhile. That he cannot do. He is **accountable** for his actual receipts from the property. He is also accountable to the mortgagor for what he would have received but for his default. So he must take **reasonable care** to maximise his return from the property. He must also take reasonable care of the property. Similarly if he sells the property: he **cannot sell hastily at a knock-down price** sufficient to pay off his debt. The mortgagor also has an

interest in the property and is under a personal liability for the shortfall. The mortgagee must keep that in mind. He must exercise reasonable care to sell only at the **proper market value**. As Lord Moulton said in *McHugh v. Union Bank of Canada* [1913] A.C. 299 , 311:

‘It is well settled law that it is the duty of a mortgagee when realising the mortgaged property by sale to behave in conducting such realisation as a reasonable man would behave in the realisation of his own property, so that the mortgagor may receive credit for the fair value of the property sold.’”

Palk v Mortgage Services Funding PLC [1993] Ch 330, 338.

The latitude afforded to the mortgagee and his entitlement to prefer his own interests

5. The **timing of a sale**, however, remains a matter for the mortgagee’s discretion, provided that he acts in good faith and not for an improper motive (see below).

“It cannot be wrong to exercise a power of sale which exists. Alleging that a decision to exercise a power is negligent in itself is tantamount to saying that the mortgagee or receiver is a trustee of the power of sale which he is admittedly not. No duty of care is owed by the mortgagee or receiver in relation to the actual decision to sell.”

Routestone Ltd v Minorities Finance Ltd & Anor. [1997] B.C.C. 180. (No duty to give the debtor time to redeem).

“It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained.¹ He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing

¹ A suggestion to contrary effect by Lord Denning in *Standard Chartered Bank v Walker* [1982] 1 W.L.R. 1410 would seem to be incorrect – *Silven Properties Ltd. v RBS* [2004] 1 WLR 997, 1004.

none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor."

Cuckmere Brick Co. Ltd. v Mutual Finance Ltd. [1971] Ch 949, 965.

See also *Downsview Nominees v First City Corporation* [1993] AC 295, 315

"The obvious conflict between the interest of the mortgagee in an early sale and the desire of the mortgagor for a longer period of marketing and as a result a potentially larger return has been resolved in favour of the mortgagee. Consistently with this there must, in my judgment, be a degree of **latitude** given to mortgagees and receivers alike **not only as to the timing of any sale but also as to the method of sale** to be employed. Once the method of sale is chosen then the property has obviously to be properly marketed in whatever way is appropriate to that method of sale. But ... the mortgagee can have regard to its own interests in deciding how to sell and that if it makes a genuine decision albeit one which resolves any doubts in its own favour then no breach of duty will have occurred. Inevitably decisions on how and when to sell will be complex and multifaceted and references to the need to obtain the best price reasonably obtainable have to be read in this context."

Bell v Long [2008] 2 BCLC 712 – 713.

6. Similarly, the **method of sale** is a matter for the mortgagee.

"Subject to any restrictions in the mortgage deed, it is for the mortgagee to decide whether the sale should be by public auction or private treaty, just as it is for it to decide how the sale should be advertised and how long the property should be left on the market. Such decisions inevitably involve an exercise of informed judgment on the part of the mortgagee, in respect of which there can, almost by definition, be no absolute requirements. Thus ... there is no absolute duty to advertise widely.... What is proper advertisement will depend on the circumstances of the case.

133. Similarly, in some cases, the appropriate mode of sale may be sale by public auction ...; in others, for example where there is a falling market, it may not. Moreover, a mortgagee who receives an offer in advance of an

auction may have to make a judgment as to whether to accept it or whether to proceed to the auction.”

Michael v Miller [2004] 2 EGLR, paragraphs 132 – 3.

7. If the **mortgagor wants the property to be sold**, however, and if the mortgagee wants the property to be retained in the hope that its value will increase, the **Court has the power** under the Law of Property Act 1925 Section 91 (2) **to direct** in a proper case that **the property be sold**, notwithstanding the mortgagee’s opposition. See *Palk* (above) where the Court made such an order in circumstances when the property was in negative equity, the income which it produced was accruing at rate which was less than the interest on the debt, and the mortgagee in effect was seeking to speculate at the risk of the mortgagor.

The mortgagee’s duties in connection with the power of sale

8. The mortgagee has, first of all, a **duty to act in good faith** and not for an improper purpose. This duty, itself, is narrowly defined.

“Breach of the duty of good faith involves something more than negligence or even gross negligence: it **requires some dishonesty**, or improper motive, some element of bad faith, to be established. Reckless indifference to the rights or interests of others or shutting one’s eyes deliberately to the consequences of one’s actions may suffice to establish dishonesty or bad faith. In judging whether the mortgagee or receiver was acting in good faith in deciding how best to serve the interests of the mortgagee, it would be inappropriate to apply any ‘Wednesbury’ type test of reasonableness, but if the decision lay outside the range which the court thought might be arrived at by a reasonable commercial man, this might provide some evidence that the decision was not taken in good faith.”

Lightman and Moss paragraph 13-008.

“The test as to dishonesty, distilled from the above authorities [Privy Council in *Royal Brunei Airlines v Tan* [1995] 2 AC 378, of the House of Lords in *Twinsectra Ltd –v- Yardley* [2002] 2 AC 164 and of the Privy Council in *Barlow Clowes International Ltd –v- Eurotrust International Ltd* [2006] 1 WLR 1476], is as follows. **Dishonesty is synonymous with a lack of probity.** It means not acting as an honest person would in the circumstances. The standard is an objective one. The application of the standard requires one to put oneself in the shoes of the defendant to the extent that his conduct is to be assessed in the light of what he knew at the relevant time, as distinct from what a reasonable person would have known or appreciated. For the most part dishonesty is to be equated with conscious impropriety. But a person is not free to set his own standard of honesty. This is what is meant by saying that the standard is objective. If by ordinary objective standards, the defendant's mental state would be judged to be dishonest, it is irrelevant that the defendant has adopted a different standard or can see nothing wrong in his behaviour.”

Aerostar Maintenance International Ltd v Wilson [2010] EWHC 2032 (Ch) at paragraphs 183-4.

9. **In addition to the duty of good faith**, however, the mortgagee also has the duty described thus in *Cuckmere Brick* (above at page 969):

“I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take **reasonable precautions to obtain the true market value of the mortgaged property** at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will **not be adjudged to be in default unless he is plainly on the wrong side of the line.**”

This duty is a **duty in equity but probably not a duty in tort** – *Downsview Nominees v First City Corporation Ltd.* [1993] A.C. 295 P.C.

“The remedy for breach of this equitable duty is not common law damages, but an order that the mortgagee account to the mortgagor and all others

interested in the equity of redemption, not just for what he actually received, but for what he should have received...”
Silven Properties (above) paragraph 19.

See, however, *Medforth v Blake* [2000] Ch 86, 102. “I do not, for my part, think it matters one jot whether the duty is expressed as a common law duty or as a duty in equity.”² The expression, “the true market value” has been used interchangeably with “a proper price” (*Yorkshire Bank v Hall* [1999] 1 WLR 1713, 1728 and with “the best price reasonably obtainable” – *Tse Kwong Lam v Wong Chit Sen* [[1983] 1 WLR 1349, 1356.

What does “the duty to take reasonable precautions to obtain the true market value” include?

10. Some **specific examples of the mortgagee’s duties**:

- (1) an attempt should be made to obtain **vacant possession** if this is likely to cause the property to realise a much higher price – *Fisher & Lightwood* paragraph 30.27, citing *Holohan v Friends Provident* [1966] IR 1.
- (2) any **planning permission** enjoyed by the property **must be correctly described**– *Cuckmere Brick* (above) and any development potential must be mentioned – *Meah v GE Home Finance Ltd.* [2013] 1 P & CR (DG 18).
- (3) **misstatements** must not be included **in auction particulars** – *Tomlin v Luce* (1889) 43 Ch D 191.

² Attempts to contract out of an equitable duty are not governed by the Unfair Contract Terms Act 1977; the difference between a tortious and an equitable source of the duty may therefore matter in some circumstances.

- (4) **rent review** procedures must be **commenced** where the mortgaged property is tenanted – *Knight v Lawrence* [1993] B.C.L.C. 215.
- (5) “a prudent mortgagee will take advice, including, where appropriate, valuation **advice**, from a duly qualified agent”- *Michael v Miller* [2004] 2 EGLR 151, and if the property is unusual, specialist advice should be obtained – *American Express International Banking Corpn v Hurley* [1985] 3 All ER 554.
- (6) the property must be **fairly and properly exposed** in the market – *Silven Properties Ltd. v RBS plc* (above). That generally means that a marketing strategy should be formulated, sales particulars should be produced and appropriately advertised – see the criticisms of the receiver in *R (on the application of Glatt) v Sinclair* [2011] EWCA Civ 1317, para 37.
- (7) **Appropriate consideration** should be given, in the light of offers received, as to **whether the market is rising or falling** and whether it has been marketed at the correct price – *R (on the application of Glatt) v Sinclair* [2011] EWCA Civ 1317. The fact that the mortgagee can sell when it likes does not mean that it can ignore the consequence that a **short delay** might result in a higher price – *Meftah v Lloyds TSB* [2001] 2 All ER Comm 741.

Note in general that “the receiver or mortgagee would not escape liability simply by showing that some other receivers or mortgagees would have acted as he has. Rather, the receiver or mortgagee must have acted consistently with a practice that is respectable, responsible and reasonable, and which has a logical basis.” *Lightman and Moss* (above) paragraph 13-039, approved in *R. (on the application of Glatt) v Sinclair* [2011] Lloyd’s Rep.F.C. 140 [9]

11. The mortgagee does not automatically discharge his duties by **selling at auction**.

Thus, in the case of an auction, reasonable steps should generally be taken:

- (1) to consider whether there should be an auction, as opposed to a sale by private treaty arranged by an appropriate estate agent;
- (2) to provide information about the auction and the property to persons who are likely to be interested in it.
- (3) to obtain advice on valuation;
- (4) to obtain advice on the setting of the reserve price – *Tse Kwong Lam v Wong Chit Sen* [1983] 1 W.L.R. 1349.

Limitations to the mortgagees' duties and liability

12. (1) The mortgagee is **not obliged to make the property more attractive** in order to increase its value by e.g. spending money on repairs (*Meftah v Lloyds TSB Bank plc* (above)), or to pursue an application for planning permission or to grant leases over the property – *Silven Properties Ltd. v RBS* [2004] 1 WLR 997.
- (2) The mortgagee can attempt to obtain **planning permission**, but is not obliged to do so and may discontinue efforts which he or others have started.
- (3) If the security comprises more than one property, and if, after a reasonable exposure to the market, there is uncertainty as to whether they can achieve a greater price singly than if they are sold as a portfolio, the mortgagee may **sell them as a portfolio** – *Bell v Long* [2008] 2 BCLC 706.

- (4) The mortgagee is entitled to **take into account the mortgagor's previous attempts to market the property**, when considering what further steps are required. Where a property is likely to appeal only to persons falling within a specialist category, a **targeted marketing** campaign (by approaching prospective purchasers directly) rather than a generalized one can be an appropriate course to take. If such a targeted campaign is undertaken, it follows that any history of offering the property for sale and it is recognised that withdrawing it may have tainted the property. – *Aodhcon v Bridgeco* [2014] 2 All ER (Comm) 928.
13. In assessing whether the mortgagee has been in breach of his duty to obtain a proper price, it is legitimate to consider evidence that that price lies within a bracket and that the mortgagee is entitled to a **margin of error** – *Michael v Miller* (above) – but see *Alpstream AG v PK Airfinance Sarl* [2016] 2 P & CR 2, referred to below. Also, in order to establish a mortgagee's liability, it is not sufficient to show that the property could have been valued at more than the sale price; **it must be shown that no valuer could reasonably have concluded** that the sale price was adequate.

Is the duty discharged if the mortgagee acts on the advice of an expert adviser whom the mortgagee has acted reasonably in appointing?

14. The answer is no. The mortgagee is not absolved from its duty by virtue of having acted reasonably in appointing an agent.

“The approach adopted by Cross LJ [in *Cuckmere Brick* (above) obiter at page 973] creates a form of strict liability on the mortgagee. His **duty of care to sell at the best price** reasonably obtainable is **not delegable** in the sense that he can avoid or perform his duty merely by appointing a reputable agent to conduct the sale, but extends to ensuring that reasonable care is taken by any agent or professional adviser employed by him in the sale.”

Lightman and Moss (above) approved at paragraph 34, *Raja v Austin Gray* [2003] 1 EGLR 91.

Does a mortgagee’s expert owe any duty to the mortgagor?

15. The answer, again, is no. In such a case, because there is generally no relationship between the mortgagor and, for example, a valuer employed by a mortgagee, there is accordingly **no assumption of responsibility** by the valuer to the mortgagor. Moreover, because the mortgagee or receiver is liable for the default of the valuer, there is no question of the mortgagor being left without a remedy.

“[43] Given that [the mortgagor] has an adequate remedy against [the mortgagee] and (on my view of the case) the receivers, I can see no reason why he should also have a remedy against the appellant valuer. I do not subscribe to the principle: ‘The more the merrier.’ A valuer in its position performs its services under a contract with the receivers that may contain limitations and restrictions of different kinds, and that may not be at all easy to fit into the concept of a duty of care in tort.”

Raja v Austin Gray (above); *Edenwest v Cameron McKenna* [2013] 1 B.C.L.C. 525

To whom does the mortgagee owe its duty to get a proper price?

16. The duty is owed **to anyone who is interested in the equity of redemption**. Such persons include guarantors of the secured debts, just as they include the mortgagor

and subsequent mortgagees. A guarantor of the secured debt is also owed this duty. *Standard Chartered Bank v Walker* [1982] 1 WLR 1410; *American Express etc. v Hurley* (above); *Skipton Building Society v Stott* [2001] QB 261

17. As regards the guarantor, a **mortgagee's breach**, of itself, **does not usually discharge** the guarantor. Rather, the **liability** of the guarantor is **reduced** by the amount of the undervalue – *Skipton B.S. v Stott* (above).

18. No cause of action based upon such a breach of duty can, however, be pursued by a person who has become **bankrupt**. Any such cause of action belongs to his trustee in bankruptcy, even after discharge – *Purewal v Countrywide Residential Lettings Ltd.* [2015] All ER (D) 60 (Nov); [2015] EWCA 1122 (although presumably it would be otherwise if such a claim were assigned to him by the trustee).

Burden of proof

19. The burden of proving sale at an undervalue is on the person who alleges it. However, if the mortgagee **sells** the property **to an associated company**, the burden of proof is reversed – *Bradford and Bingley v Ross* [2005] EWCA Civ 394. See also *Alpstream AG v PK Airfinance Sarl* [2016] 2 P & CR 2

Measure of compensation (or strictly speaking the charge against the mortgagee in the accounts)

20. The **measure of compensation** is the difference between the price achieved and the price which would have been achieved if the property had been marketed properly. While expert evidence as to valuation will often be relevant, it is not necessarily decisive.

“... [I]t was the view of two of their Lordships in... [*Cuckmere Brick* (above)] that, even where the duty has been breached, the measure of compensation is not measured automatically by the difference between the price paid and what the expert assesses to have been the true market value of the property. Rather the compensation must be assessed on the **difference between the price paid and the price at which the property would probably have sold had the duty been discharged**, which is not necessarily the market value attributed to the property by an expert.”

Meah v GE Money Home Finance Ltd [2013] EWHC 20 (Ch) (where there had been no offers which approached the figure which the expert had claimed the property to be worth).

Where it is found that there has not been a reasonable attempt to obtain a proper price, the court may take a median figure within any valuations which are received in evidence and which the court considers to be credible (valuation not being an exact science). These valuations should take account of the forced nature of the sale, but should not necessarily be taken on a forced sale basis. See *Skipton Building Society v Stott* (above), paragraph 25.

NB: In *Alpstream* (above) the Court of Appeal held:

- (1) If the **actual sale price is within the range of reasonable valuations**, there will be **no liability** and therefore no compensation to assess. To suggest otherwise is to confuse the question of liability with the question of remedy. **However**,

- (2) Where there is a connection between the mortgagee and the purchaser so as to give rise to a **conflict between interest and duty**, and that if such a purchaser fails to obtain an independent valuation and pay the price specified, he is not permitted a margin of error on the question of liability the assessment of compensation will not be lowered by reference to a range of respectable valuations. Instead,

“... the court would only be concerned with damages calculated by reference to the market value determined by the evidence of whichever independent expert the court found provided the most reliable guide to the figure which the property was most likely to fetch.”

Attempts to exclude liability

21. **Exclusion clauses** can be effective, but they are **construed restrictively**. Thus, in *Bishop v Bonham* [1988] 1 WLR 742, where the mortgagee relied upon provisions in the mortgage deed which entitled it to sell the mortgaged property for such consideration as it might think fit and which excluded liability for loss “howsoever caused”, the Court held that these did not protect the mortgagee from a claim arising out of any failure to take reasonable care to obtain a proper price.

Set-off

22. A claim against the mortgagee may in certain circumstances amount to a **set-off**, thereby reducing the debt. A set-off, if unliquidated, **will not** however **prevent** the

mortgagee from **recovering possession** under the “before the ink is dry” principle – *Mobil Oil v Rawlinson* 43 P & CR 221. Most claims relating to realisation will be unliquidated. Nonetheless, if the set-off is for a **liquidated** amount, it is possible that the mortgagor will be able to resist a possession claim. This is because it has been recognized that such a claim, if established might extinguish the mortgage debt altogether. The question of whether it does or not was left open in *National Westminster Bank v Skelton* [1993] 1 W.L.R. 78. That aside, the existence of a claim, liquidated or not, may be taken into account by the Court in deciding whether to make use of its powers to delay possession under the Administration of Justice Acts 1970 and 1973, where these provisions are applicable. By contrast, a claim against a receiver will not give rise to a set-off against the mortgagee, unless the mortgagee has interfered in the receivership – *Standard Chartered Bank Ltd. v Walker* [1982] 1 WLR 1410. This is because, **absent such interference, the mortgagee is not liable** for the receiver’s misconduct.

“If [the mortgagee] exercises his power to take possession, he becomes liable to account on a strict basis (which is why mortgagees and debenture holders operate by appointing receivers whenever they can).”

Yorkshire Bank v Hall [1999] 1 WLR 1713, 1728.³

Stopping a sale by injunction

23. **The Court will not intervene if contracts have already been entered** into except in a case of impropriety, and selling at an undervalue will not of itself amount to such

³ For examples where the receivers’ acts bound the mortgagee because of the mortgagee’s interference, see *American Express etc. v Hurley* (above) and *Mann v Nijar* [1998] EGCS] 188 (tenancy created by receiver binding upon mortgagee).

impropriety – *Lord Waring v London and Manchester Assurance Co Ltd* [1935] Ch 310; *Property and Bloodstock Ltd v Emerton* [1968] Ch 94. The impropriety must be that of the mortgagee, rather than the purchaser – *Corbett v Halifax plc* [2003] 1 WLR 964. The Court has a freer hand when the claim is to **restrain the making of a contract** rather than its completion. However, the Court may permit the prospective purchaser to be added as a party in an interim injunction application, in order that the purchaser's convenience may be weighed in assessing the balance of convenience, and it will then tend to assess that balance on the basis that the mortgagor's interest is adequately protected by the mortgagee's and purchasers' undertakings in damage, especially if the mortgagor accepts that a sale needs to take place. For a case where the Court did grant an injunction, see the Northern Irish case of *O'Kane v Rooney* [2013] NIQB 114.

An injunction was granted on credible evidence that various potential purchasers had been discouraged from bidding for the property, that the agents had provided them with inaccurate information, that one bidder had been told by the agents not to bid more than a given sum because he could get the property for that price and that a sealed bid process had been stopped in favour of a sale by private treaty for no apparent reason. As a condition for the grant of the injunction, the Court required a substantial payment into court in order to support the claimant's undertaking in damages.

Receivers

24. As noted above, a receiver owes the persons interested in the equity of redemption the same duties which a mortgagee in possession with regard to the exercise of his power of sale. The two differences between a receiver and a mortgagee are that:

- (1) whereas a mortgagee, naturally, is under no duty to protect its own interests, the receiver is under a duty to the mortgagee to bring about a situation whereby the interest on the debt is paid and the debt itself is discharged. The receiver's duties to the creditor are therefore fiduciary in nature.
- (2) whereas the duties which the mortgagee owes to the mortgagor arise only when the mortgagee takes possession, the **duties which the receiver owes to the mortgagor and the mortgagee arise immediately upon the receiver's appointment**. Therefore, although a receiver can always decide to delay in, for example, selling the property, he must always keep the exercise or non-exercise of his powers under consideration.

25. The position of a receiver is set out in the following dicta:

"In a number of respects it is clear that a receiver is in a very different position from a mortgagee. Whilst a mortgagee has no duty at any time to exercise his powers to enforce his security, a receiver has no right to remain passive if that course would be damaging to the interests of the mortgagor or mortgagee. In the absence of a provision to the contrary in the mortgage or his appointment, **the receiver must be active in the protection and preservation of the charged property** over which he is appointed: see *Lightman & Moss, The Law of Receivers and Administrators of Companies*, 3rd ed (2000), para 7-030. Thus if the mortgaged property is let, the receiver is duty bound to inspect the lease and, if the lease contains an upwards only rent review, to trigger that rent review in due time: see *Knight v Lawrence* [1991] 1 EGLR 143. His management duties will ordinarily impose on him no general duty to exercise the power of sale: see *Routestone Ltd v Minorities Finance Ltd* [1997] BCC 180, 187g. But a duty may arise if e.g. the goods are perishable and a failure to do so would cause loss to the mortgagee and mortgagor."

Silven Properties Ltd. v RBS [2004] 1 WLR 996, 1006 per Lightman J

- “(1) A **receiver** managing mortgaged property **owes duties to the mortgagor** and anyone else with an interest in the equity of redemption.
- (2) The duties include, but are not necessarily confined to, a duty of good faith.
- (3) The extent and scope of any duty additional to that of good faith will depend on the facts and circumstances of the particular case.
- (4) In exercising his powers of management the **primary duty** of the receiver is **to try and bring about a situation in which interest** on the secured debt can be paid **and the debt itself repaid**.
- (5) Subject to that primary duty, the receiver owes a duty to manage the property with **due diligence**.
- (6) Due diligence does not oblige the receiver to continue to carry on a business on the mortgaged premises previously carried on by the mortgagor.
- (7) If the receiver does carry on a business on the mortgaged premises, due diligence requires reasonable steps to be taken in order to try to do so profitably.”

Sir Richard Scott V.-C. in *Medforth v Blake* [2000] Ch 86, 102.

26. The **receiver acts as the agent**, not of the mortgagee, but instead **of the mortgagor**.

The receiver’s **duty**, however, is **not affected by his being an agent of the mortgagor**. See *Silven Properties Ltd. v RBS plc* at paragraph 29 [2004] 1 WLR 997, 1008 where, after it is noted (paragraph 28) that the only purpose for the creation of the agency relationship is to make the mortgagor, rather than the mortgagee, responsible for the receiver’s acts, it was held:

“... the receiver is not managing the mortgagor's property for the benefit of the mortgagor, but the security, the property of the mortgagee, **for the benefit of the mortgagee**”

27. On the other hand, it is now clear that, subject to the receiver's primary duty to bring about a situation where the debt interest is met and the debt is itself repaid, the receiver, like a mortgagee in possession, also owes a **duty of fairness** to the mortgagee. Dicta to the contrary in *re B Johnson & Co (Builders) Ltd* [1955] Ch 634, and *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295, which suggest that there is no overarching duty of fairness to the mortgagor, should now be treated with caution in the light of the following passage in *Medforth v Blake* [2000] Ch 86, 98-9

“Why should the approach be any different if what is under review is not the conduct of a sale but conduct in carrying on a business? If a receiver exercises this power, why does not a specific duty, corresponding to the duty to take reasonable steps to obtain a proper price, arise? If the business is being carried on by a mortgagee, the mortgagee will be liable, as a mortgagee in possession, for loss caused by his failure to do so with due diligence. Why should not the receiver/manager, who, as Lord Templeman held, owes the same specific duties as the mortgagee when selling, owe comparable specific duties when conducting the mortgaged business? It may be that the particularly onerous duties constructed by courts of equity for mortgagees in possession would not be appropriate to apply to a receiver. But, no duties at all save a duty of good faith? That does not seem to me to make commercial sense nor, more importantly, to correspond with the principles expressed in the bulk of the authorities.”

In *Medforth v Blake*, the complaint against the receivers was that in managing the mortgagor's pig-rearing business, they had failed to run it competently in that it did not secure discounts which were available for the purchase of animal feed. The court held that if the complaint were proved, compensation would be payable.

Court appointed receivers

29. This topic can be dealt with shortly.

“A **receiver appointed by the court** is under the same fiduciary duties and duties of care as the receiver appointed out of court. So, for example, a court-appointed receiver must act in good faith and must not compete with the company or seek to profit from his position. If he wishes to purchase, whether himself or through a company, any of the property over which he is appointed, he can only do so with the leave of the court. The court-appointed receiver must take reasonable care to obtain the best price reasonably obtainable for any property which he sells.”

Lightman & Moss paragraph 29-015.

For a recent example where a court-appointed receiver’s conduct of a sale was considered, see *R (on the application of Glatt) v Sinclair* (above). It should be remembered that a court-appointed receiver is an **officer of the court** and does **not** act as an **agent** for the debtor or anyone else.

Administrators

30. As noted in the Table above, the **Administrator** can be **appointed by the Court** under the Insolvency Act 1986 Sched B 1 (added by Enterprise Act 2002) para 10, or **by the Company** under Para 22 or **by the holder of a qualified floating charge** – ie a charge over substantially the whole of the Company’s property which permits the holder to appoint an administrator – under Para 14. The Administrator acts as the agent of the company – Para 69. The Administrator can seek the Court’s directions but there is no obligation to do so – *Re Transbus International Ltd.* [2004] 2 All ER 911.

31. The Administrator must perform his functions in accordance with one of three “objectives” set out in Para 3:
- (a) rescuing the company as a **going concern**, or
 - (b) achieving a **better result for the company's creditors** as a whole than would be likely if the company were wound up (without first being in administration), or
 - (c) **realising property in order to make a distribution** to one or more secured or preferential creditors.
32. The Administrator is to adopt objective (a) unless he thinks either that it is not reasonably practicable to achieve that objective or that the objective (b) would achieve a better result for the company’s creditors as a whole (ie not just the secured or preferential creditors). Objective (b) is generally achieved by a sale of the assets of the company as a going concern. Objective (c) is to be adopted only if the Administrator thinks that neither (a) nor (b) is possible and that (c) can be achieved without unnecessary harm to the creditors as a whole – Para 3 (4). The effect of this last provision is that, unlike in the case of receivers, “the Administrator is not free to realise the assets at a time of his choosing if, in all the circumstances, a better price could be obtained were they to be sold at some other time.” *Lightman and Moss* (above) paragraph 12-019.

“... the administrator as agent for the company owes a **duty of care to the company in the choice of the time to sell** and (by parity of reasoning) in the decision whether to take the appropriate available advantageous pre-marketing steps which are calculated to achieve the best price.”
Silven Properties Ltd. v RBS plc [2004] 1 WLR 997, 1007 (para 25)

33. The Court will only appoint an Administrator where there is a genuine business to rescue (e.g. where the company is engaged in a single venture). It will not make an appointment where the purpose of the application is merely to take advantage of the moratorium on the enforcement of securities in order to have the disposal conducted by someone who is more friendly to the Company than a receiver, who is primarily responsible to the creditors, would be – *Doltable Ltd. v Lexi Holdings plc* [2006] 1 BCLC 384.