

Chapter 31: Lender's Rights and Remedies

2.5.5 Section 36 and court orders for sale

We noted that the courts are reluctant to use s.91 LPA 1925 to enable a borrower to take control of the sale of the mortgaged property particularly where there is negative equity.

Toor v State Bank of India [2010] EWHC 1097

Facts On the day before the possession order that the bank had obtained was due to be executed, the Toors applied under s.91 for an order to sell their property to family friends. The Court declined to grant their request

David Cooke HJJ

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Prima facie it is the right of the mortgagee to determine how and when to exercise its security. The court does have the power to interfere with that exercise of judgment under section 91. It is a power which is accepted by both counsel to be an unfettered discretion, to be exercised judicially. It is the case, in my view, that the authorities indicate that it would be exceptional to exercise that power to compel the mortgagee to make a sale at a time when it does not wish to do so where there would be a shortfall in the mortgage debt resulting. Nevertheless, the court can do so if the alternative would be to cause unfair prejudice or other unfairness, as in the *Polonski* case, to the mortgagor. In my judgment, it is for the mortgagor to make an application and to demonstrate by evidence that the requisite degree of prejudice or unfairness will result. Furthermore, the court should be cautious about enabling this procedure to be used in a manner which would open up the prospect of desperate applications with a view to staving off eviction in unmeritorious cases.

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Next, it seems to me that the court, considering whether these applications might be used simply to stave off evictions, ought properly to take additional caution where the proposal to sell is a proposal effectively to sell to the mortgagors themselves or to connected parties. Such a proposal raises the increased possibility, and in this case it seems to me to be the overwhelmingly preponderant motive, that the true motive of the proposal is that the mortgagors themselves should stay in occupation rather than that their financial liabilities should be minimised or the secured liability to the mortgagee should be minimised. There is an obvious incentive if the effect of an order, potentially to say or do whatever is necessary, is to stave off the eviction in the hope that something may turn up. That is not a reason for refusing such an order in all such cases but it is a reason, it seems to me, for approaching proposals which are made on that footing with an additional amount of caution.

2.6 POSSESSION AND HUMAN RIGHTS

We have noted that there has been criticism of the lender's right to take possession and in particular that the limited procedural safeguards may constitute a breach of Article 8, where the security is the borrower's home, or of Article 1 Protocol 1 where the property is sold.

The case of *Horsham Properties Group Ltd v Clark*,¹ where the lender did not seek possession but appointed a receiver to sell the property without the borrower's knowledge, has sparked concern over loop holes in procedural protection where the usual route to sale via a possession order is not followed. As a result the issue has been the subject of a consultation by the Ministry of Justice who has proposed that unless the borrower consents the court must sanction a lender's enforcement of his security either at the stage of obtaining possession or at the sale stage via an order for sale.² The consultation has closed but as yet there is no word on taking these proposals any further.

4.3 DUTIES OF A RECEIVER

The case of *Bell v Long*³ provides another example of the standard of care required of receivers that was articulated in *Silven Properties Ltd v Royal Bank of Scotland*.⁴ Here the receiver had initially been advised to market the four mortgaged properties separately in order to obtain the best valuation, assuming a 6-9 month marketing period, of around £955,000. Prior to formal marketing, various offers were received for the properties, including for all four properties as a portfolio. The lender was subsequently advised that, in view of the large number of similar properties about to come onto the market, an early sale of all four properties was advantageous. The lender thus decided to accept an offer for all four properties of £730,000 after just over 3 months marketing. The court rejected a claim that the receiver had acted in breach of his duty of care. The receiver was entitled to choose the time of sale and in the circumstances his choice of the certainty and costs saving of an early sale of all four properties could not be impugned despite the earlier advice.

¹ [2009] 1 P&CR 8.

² Mortgages: Power of Sale and Residential Property (December 2009) see <http://www.justice.gov.uk/consultations/docs/mortgages-power-sale.pdf>

³ [2008] EWHC 1273.

⁴ [2003] EWCA Civ 1409.