

1. **Bob and Andy both own large plots of land very near to each other. Bob decides that he wants to build on part of his land, but he does not have the money to complete the project by himself. Andy agrees to lend him £150,000, secured on Bob's land. He insists that the mortgage agreement contains the following clauses:**
- **the mortgagor may not redeem the mortgage for ten years;**
 - **the mortgagor shall use only the mortgagee's field during the building project to store all of the building materials and the mortgagor shall pay the mortgagee a reasonable sum for the use of his field;**
 - **the mortgagee has the right to purchase one half of the mortgaged land at market value within five years of the date of this agreement.**

Advise Bob whether a court is likely to decide whether all, or any, of these terms will be binding on him.

Equity protects the mortgagor by preventing the mortgagee from attaching any unfair restrictions or applying any unfair conditions to the mortgage contract. This protection is often referred to as the prohibition of **clogs and fetters** on the mortgage. In particular, the court will not look favourably on any clauses in the mortgage agreement which restrict the mortgagor's right to redeem the mortgage, or which give the mortgagee an advantage collateral to the mortgage. The key element that the court will look for is unconscionability. A clause will be deemed unfair and unconscionable only if it can be shown that '*one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience*'—*Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, 110, *per Browne-Wilkinson J*.

It appears in this situation that Bob and Andy are both private individuals, and that they are seemingly entering into a contract on equal terms. The first clause restricts Bob from redeeming the mortgage for ten years. The court takes a fairly pragmatic view of clauses such as this. If the clause essentially prevents the mortgagor from redeeming the mortgage at all, then the clause will be struck down by the court (see, *Fairclough v Swan Brewery Co* [1912] AC 565). If however, the clause merely restricts that right for a period of time, and is not oppressive, the court will allow the clause to stand (see *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441). Given the equality of the parties, and the nature of the enterprise, it is likely that the court would not regard this clause as unconscionable.

The second clause is also to the advantage of the mortgagee, in that it ensures that Bob must use Andy's field for storage whilst the building works are completed. The mortgagor must pay the mortgagee for this, but only a "reasonable sum". Once again, this appears to be reasonable and not oppressive. Bob agreed to such a clause in order to raise funds for his building development, and there is nothing to stop the parties entering into a commercial agreement that benefits both sides.

The final clause may not be as straightforward. Effectively it gives Andy the right to buy half of the mortgaged land in five years. Although this is on commercial terms

(“market value”), in reality it is fettering the mortgaged land, as Bob would have no choice other than to sell, whether he wanted to or not. A similar clause was found in *Jones v Morgan* [2002] 1 EGLR 125, and the Court of Appeal rather reluctantly decided that it constituted a clog on the mortgagor’s equity of redemption. See 13.3.2.4 for more detail.

2. **Terry is now six months behind with his mortgage repayments and the bank has written to him twice: firstly, asking for immediate payment, and then informing Terry that it is starting proceedings for possession. Terry is a self-employed roofer. He has not paid his mortgage, because he had a bad fall from a ladder and broke his leg. When he is unable to work, he does not get paid. His leg has now healed and he is due to begin work again next week. His wife, Abigail, has also just returned to full-time work after a year’s maternity leave. Terry does not want to lose his home. Advise Terry. What can the bank do? Is there anything that might help Terry to keep his home?**

The bank (the mortgagee) has an immediate right to seek possession of Terry’s home as soon as the mortgage agreement has been signed (*Four-Maids Ltd v. Dudley Marshall (Properties) Ltd* [1957] Ch 317). However, it will usually only try to take possession after a number of mortgage instalments have been missed. The bank has indicated to Terry that it is applying to the court for an order allowing it to take possession of the house. This is, surprisingly, rather good news for Terry, because it brings into play a statutory lifeline that may allow Terry to keep his home.

When a mortgagee brings proceedings for possession of a residential property, the court has an inherent discretion to allow the mortgagor some time to remedy the financial problem. There is also important statutory protection under s.36 of the Administration of Justice Act 1970 (AJA 1970). This gives the court the opportunity to delay the proceedings if it appears to the court likely that the mortgagor can repay “any sums due” under the mortgage within a “reasonable” time. In Terry’s case, then, the court will look at whether he will be able to repay the six months’ mortgage payments that he has missed, together with any future payments due.

In deciding what constitutes a “reasonable” time, the court takes as its starting point the remainder of the life of the mortgage (*Cheltenham and Gloucester Building Society v. Norgan* [1996] 1 WLR 343). Note that this is indeed only a starting point and not an automatic right for the mortgagor. The court will exercise its discretion and decide according to the circumstances of the individual case.

Applying this to Terry’s situation, it would appear that the court may well allow him some more time to pay his mortgage. Not only is he fit enough to begin working and earning money once more, but his wife is also returning to full-time work after her maternity leave. The family’s financial position will therefore be much healthier in the coming months.

See 13.3.3.2 for more detail.

3. **Suki purchased her property four years ago with a mortgage of £300,000. She has been unable to keep up her mortgage repayments for the past six months and now wants to sell her home. Unfortunately, the area in which she lives has become rather run down and she can only find a buyer willing to pay £280,000 for her house. She has asked the mortgagee to consent to a sale, but it has refused. Instead, it has applied for a possession order. It does not want to sell her home, but wants her instead to rent it out for two years. This is because it believes that the government is soon to announce a major regeneration programme in the area, which will significantly increase the value of the property. Advise Suki. Can she sell her home without the mortgagee's consent? What might she do next?**

The power of sale has become exercisable for the mortgagee, as Suki is now six months behind with her repayments (s.103 LPA 1925). Once the power of sale becomes exercisable, the mortgagee can choose when it sells the property. It is under no obligation to wait for better market conditions, although it must try to obtain the true market value of the property when it does decide to sell—*Cuckmere Brick Co Ltd v. Mutual Finance Ltd* [1971] Ch 949. Equally, however, the court does not allow it to delay a sale unduly in the hope of obtaining a better price. If the property were to be rented for two years, Suki's debt to the mortgagee would probably simply continue to increase.

Suki would be advised to make an application to the court under s.91(2) of the LPA 1925. Under this section, the court may grant an order allowing Suki to sell the property, despite the mortgagee's objection (see *Palk v Mortgage Funding Services plc* [1993] Ch 330).

Suki's circumstances are similar to the those of the mortgagor in *Polonski v. Lloyd's Bank Mortgages Ltd* (1998) 1 FLR 896. This case established that, in exercising its discretion under LPA 1925, s. 91(2), the court was not limited to consideration of purely financial matters, but could take into account the applicant's social circumstances. Suki would need to explain why she wanted to move, and demonstrate how this would help her situation – for example, if she moved to an area where there were better job opportunities for her. See 13.3.3.4 for more detail.

If the court exercised its discretion and made an order for sale, Suki should be aware that the mortgagee would still be able to sue her on her personal covenant for the balance of any amount still due under the mortgage. The right of the mortgagee to sue on the mortgagee's covenant continues for 12 years from the date that the right to receive the money accrued—Limitation Act 1980 (LA 1980), s. 20(1). See 13.3.3.1 for more detail.

4. **Sharon's husband, Irvine, has asked her to sign some papers that he says are necessary to help his business. He explains that they need a second mortgage over their family home, to raise some cash. He is very vague about the amount that they will be borrowing and has told her not to worry: that it is a short-term measure. The bank has sent her a letter asking her to nominate a solicitor, but Irvine has told her not to bother with 'all that legal stuff'. Advise Sharon. What**

will be the practical consequences if she signs the documents? Explain the steps that the bank will take in relation to the transaction.

Sharon should think very carefully before signing the documents. Her husband is doing her no favours by urging her to sign them without taking legal advice. The indications are that Irvine's business is struggling financially already. If Sharon signs the documents and then Irvine and Sharon default on repaying their additional mortgage, the bank may well seek possession of the house and sell it. Sharon would lose her home.

In situations such as this, where the transaction is not, on the face of it, to Sharon's advantage, the bank will be put on notice that Irvine has potentially unduly influenced Sharon to sign the mortgage documents. It will therefore take the steps outlined in *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44

Firstly, the bank will write to Sharon and ask her for the name of the solicitor that she would like to act for her in the transaction. If Sharon does not respond, the bank will not proceed with the transaction.

The bank must then obtain Irvine's consent to disclose his financial information to the solicitor and, if consent is obtained, should disclose this information. If Irvine does not consent, the bank should not proceed with the transaction.

The solicitor must have a private, face-to-face meeting with Sharon alone. The solicitor should explain the transaction to her in everyday, non-technical language.

The House of Lords also set out the "core minimum" content for the advice that the solicitor should give the wife in such a situation (see 13.3.3.4 and the case close up for more detail).

The bank should then obtain confirmation from Sharon's solicitor that the meeting has been appropriately carried out.

If the bank complies with all of these steps, and Sharon still goes ahead and signs the documents, then Sharon will not be able to claim at a later date that she has been the victim of Irvine's undue influence. The bank will be protected from such a claim.