

# Real Property Law

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## 15.1 Possession Orders

### **15.1.1 The primary remedy**

The primary remedy available to the owner of land is repossession by means of an action for recovery of land. The procedure which an owner must follow to obtain possession will vary depending on whether the occupier is occupying the land or premises as a tenant, a licensee or as a trespasser. A fairly complicated statutory procedure must be followed if the occupier has occupation rights which are protected by the Housing Act 1985, the Housing Act 1988, the Rent Act 1977 or the Landlord and Tenant Act 1954. The procedure for most actions for possession of premises is governed by Part 55 of the Civil Procedure Rules 1998.

### **15.1.2 Possession claims against trespassers**

CPR, Part 55, provides the landowner with a rapid remedy against anyone who occupies the land without her or his consent. The landowner need only issue a claim form claiming possession. Five clear days, or two clear days in case of non-residential premises, after service of the claim form the court may make an order for possession. Where the occupier entered as a trespasser the court has no power to suspend the order. The order will be effective even though the landowner cannot discover the names of the occupiers. This procedure is used most commonly against squatters although it is also available against ex-licensees. The court has power under the Housing Act 1980, s 89, to suspend an order against certain ex-licensees (e.g., an occupier under a restricted contract or secure tenancy) for 14 days or up to 6 weeks in case of exceptional hardship.

### **15.1.3 Interim possession orders**

Section III of CPR, Part 55, contains rules that enable a landowner to obtain a possession order against occupiers who entered the land as trespassers. The landowner applies by a claim form, supported by affidavit and various undertakings, eg, as to paying damages, for an interim possession order, which the court may make not less than three days after the

date of issue of the application. The order commands the occupier to vacate the premises within 24 hours of service and informs the occupier of the date for a hearing in the presence of both parties not less than seven days later. Under the Criminal Justice and Public Order Act 1994, s 76, it is a criminal offence for such an occupier to remain in the premises after this 24-hour period has elapsed and the occupier may be arrested by a uniformed constable without warrant. The Act also imposes criminal liability on a landowner who obtains an interim possession order by knowingly or recklessly making false or misleading statements (s 75).

#### **15.1.4 Damages for trespass**

A landowner may claim damages against a trespasser for trespass. Such a claim will include compensation for the use and occupation of the land which is normally awarded on the basis of the current letting value of the property. Where the occupier is a former tenant and holds over as a tenant at will/on sufferance this part of the claim is generally known as a claim for 'mesne profits' becoming damages for trespass when the owner terminates the tenancy at will/on sufferance, eg, by demanding possession.

#### **15.1.5 Landlord and tenant—determination of the lease**

Where premises are let to a tenant, a landlord may be able to regain possession of the premises by determining the lease. There are a number of ways in which a lease can be determined including:

**(a) Surrender:** The tenant may surrender the lease before the end of the contractual term.

A surrender at law must be made by deed (s.52 Law of Property Act 1925), but in equity, a surrender will be effective if it is made in writing and satisfies s.53 (1) (a) LPA 1925. An agreement to surrender in the future must comply with s.2 Law of Property (Miscellaneous Provisions) Act 1989. An implied surrender by operation of law may be effected without writing. In all cases, the surrender by the tenant will only end the tenancy if the landlord

assents. The tenant remains liable for any breach of covenant that occurred before the surrender took place.

**(b) Determination by exercising an option or a break clause in the lease:** Determination of the tenancy is likely to be effective only if there is strict compliance with the terms of the clause, although minor errors will not necessarily invalidate a notice if a reasonable recipient would not be misled by them: *Mannai Investment Co v Eagle Star Assurance Co* [1997] A.C. 749, HL.

**(c) Notices to Quit:** Periodic tenancies need to be determined by a Notice to Quit, which expires at the end of a current period, and the relevant period will depend on whether it is a yearly, monthly, weekly or quarterly periodic tenancy. Care needs to be taken to ensure that the Notice to Quit expires on the correct date and that it gives the correct length of notice. Note too that, in most cases (for excluded tenancies and licences, see s.3A) where premises are let as a dwelling, a Notice to Quit will not be valid unless it is given not less than four weeks before the date on which it is to take effect (s.5 Protection from Eviction Act 1977), and such notices need to be in writing and contain prescribed information (see Notice to Quit (Prescribed Information) Regulations SI 1988/2201).

**(d) Forfeiture:** This is only available where the lease expressly provides for forfeiture by re-entry for breach of covenant or where there is a breach of a condition. Procedures vary according to the type of covenant breached. In general terms, forfeiture can be effected by physical re-entry or by service of proceedings although, in practical terms, most forfeitures take place by the issue and service of court proceedings because s.2 of the Protection from Eviction Act 1977 provides that while any person is lawfully residing in the premises or any part of them, it shall not be lawful to enforce a right to forfeiture otherwise than by proceedings in court. If there is someone present in the premises, but not "residing" there, effecting forfeiture by physical re-entry may amount to an offence under s.6 of the Criminal

Law Act 1977. There are also statutory restrictions on forfeiture where the tenant is insolvent and also where a right of forfeiture is being exercised for non-payment of rent or service charges.

- (i) *Rent*. The landlord must make a formal demand for rent unless either the lease permitting forfeiture contains a provision dispensing with this requirement—every well-drafted lease will contain such a provision—or, in some circumstances, when there is more than six months' rent in arrears. Where a landlord wants to forfeit for non payment of residential ground rents in respect of long leases (i.e. terms exceeding 21 years), he must first serve notice in accordance with s.166(1) or, if applicable, s.167 of the Commonhold and Leasehold Reform Act 2002 and the Regulations made pursuant to that Act.
- (ii) *Other covenants*. In most cases the Law of Property Act 1925 (LPA 1925), s 146 requires a notice to be served which:
  - (a) specifies the breach complained of;
  - (b) if the breach is remediable, requires the tenant to remedy it;
  - (c) where the landlord wants financial compensation, calls on the tenant to pay it.

In respect of long leases, there are also restrictions imposed on the service of a s.146 notice by s.166-172 of the Commonhold and Leasehold Reform Act 2002. See also the Leasehold Property (Repairs) Act 1938 and s.18 (2) of the Landlord and Tenant Act 1927 and further the Housing Act 1996, s. 81 and 82 and s.167 and s.170 of the Commonhold and Leasehold Reform Act 2002 for particular requirements in relation to forfeiture for breach of a repairing covenant and for failure to pay service charges respectively.

Forfeiture will not be available if the breach has been waived, e.g., by the landlord accepting rent with knowledge of the breach unless the breach is a continuing one, e.g. of a repairing covenant.

Even if the landlord takes steps to forfeit the lease, a tenant may still apply to the court for relief from forfeiture. This will be granted more readily in the case of forfeiture for non-payment of rent than where the forfeiture is for breach of some other covenant. The jurisdiction to grant relief derives from s.210 of the Common Law Procedure Act 1852, s.38 of the Supreme Court Act 1981 or s.138-140 of the County Courts Act 1984 (non payment of rent) or by s.146(2) LPA 1925 (all other breaches).

### **15.1.6 Possession claims against residential occupiers**

Generally when a landlord is dealing with a tenant or a licensee of a dwelling house, regard should be had to the provisions of the Protection from Eviction Act 1977 (as amended by the Housing Act 1988) which:

- (a)** impose criminal penalties for the unlawful eviction and harassment of residential occupiers (s.1(3) of the Protection from Eviction Act 1977);
- (b)** creates a statutory tort for harassment and unlawful eviction (s.27 and s.28 Housing Act 1988). Damages for this statutory liability are assessed in accordance with those provisions of the Act.
- (c)** require a notice to quit served in respect of a tenancy to be of at least four weeks' duration and to contain prescribed information;
- (d)** require the service of a four-week notice containing prescribed information to terminate most periodic licences;
- (e)** require a landlord to effect forfeiture through court proceedings rather than by a physical re-entry onto the land;
- (f)** in the case of residential tenants and licensees not entitled to the statutory protection given by the Acts mentioned in the next paragraph, restrict the owner to recovering possession through court proceedings;
- (g)** provide a civil claim for damages against a landlord who unlawfully evicts a

residential occupier in breach of these requirements.

Further, in the case of tenants entitled to statutory protection under the Rent Act 1977 (protected tenants), the Housing Act 1985 (secure tenants), or the Housing Act 1988 (assured tenants), the landlord is restricted in the exercise of his or her common law rights to possession, e.g., on service of a notice to quit (thus ending the tenancy) and will normally have to also prove the existence of statutory grounds for possession. Note, however, that most assured tenancies granted after 28 February 1997 will take effect as assured shorthold tenancies and as such will be subject to an easily satisfied mandatory ground for possession (Housing Act 1988, s 19A added by Housing Act 1996, s 96).

### **15.1.7 Possession claims against Business occupiers**

Security of tenure for business tenants is achieved by the Landlord and Tenant Act 1954. The effect of this Act is that once the contractual term has been determined, the tenancy continues automatically unless and until it is terminated by a method laid down by the Act (s.24). The tenancy can be terminated by the landlord serving a notice in the prescribed form under s.25 or by the tenant serving a notice requesting a new tenancy under s.26 (note a tenant has also the right to terminate the continuation tenancy by serving a notice under s.27). After a s.26 or a s.25 notice has been served, either the landlord or the tenant is entitled to apply to the court for an order terminating the tenancy and/or the grant of a new tenancy as applicable under s.29. The tenant is entitled to a new tenancy unless the landlord can make out one of the grounds of opposition set down in s.30 of the Act. Even if the landlord successfully opposes the grant of a new tenancy by making out one of the grounds of opposition, the tenant may be entitled to compensation for disturbance, depending on which ground is established.

## **15.2 Additional remedies**

As between landlord and tenant various additional remedies are available.

### 15.2.1 Damages for breach of covenant

Actions typically involve breaches of covenants to insure, covenants for quiet enjoyment, covenants against assignment or subletting (which may be subject to statutory modification by s.19 (1) and s. 19(1A) to 1(E) of the Landlord and Tenant Act 1927 and the Landlord and Tenant Act 1988), covenants against alteration or change of use or, most commonly of all, covenants to repair the premises.

The measure of damages for breach of covenant will be assessed on the usual basis. However as the claim is usually framed in contract, damages for distress or exemplary damages are not usually available (*Perara v Vandiyar* [1953] 1 W.L.R. 672). However in some cases, such as a breach of the covenant of quiet enjoyment, it is possible to also plead the claim in tort, in which case exemplary and aggravated damages can also be awarded.

In relation to repairing covenants, a tenant may achieve some degree of protection by s.147 LPA 1925 by which he can apply to the court for relief from liability in respect of certain internal decorative repairs. Tenants can also gain some protection if the Leasehold Property (Repairs) Act 1938 applies to the lease, in that in the circumstances prescribed by that Act, the landlord cannot enforce its right to damages for breach of covenant except with the leave of the court, which will only be granted if the landlord proves one or more of the circumstances set out in s.1(5).

Where a tenant sues a landlord for breach of a repairing covenant, the amount of damages he may recover is prima facie the difference in value of the premises to the tenant measured by the condition the premises are now in compared to the condition they would have been in had the landlord complied with his obligations (*Hewitt v Rowlands* [1924] L.J.K.B. 1080 and also see *Calabar Properties Ltd v Sticher* (1984) 1 W.L.R. 287).

Damages can include the cost of repair and re-decoration, alternative accommodation

costs, as well as general damages for inconvenience and discomfort.

Where the landlord is seeking damages for disrepair, a “statutory ceiling” is imposed on the amount he can recover by s.18(1) of the Landlord and Tenant Act 1927, which provides that damages should not exceed the amount (if any) by which the value of the reversion is diminished owing to such breach, and no damages at all can be recovered if, at or shortly after termination of the tenancy, the premises are to be pulled down or altered in such a way as to render the repairs valueless. This “statutory ceiling” often operates to prevent the landlord recovering damages for the cost of remedying the disrepair if this is more than the diminution in value of the reversion. However, it only applies to a claim for damages, not a debt claim.

### **15.2.2 Action to enforce payment and distress**

A landlord may enforce payment of rent either by an action for the money or by distress (seizing the tenants’ goods). A landlord should beware. Distress is an intricate remedy.

If the distress is illegal, excessive or irregular, the landlord may be liable for damages for wrongful distress.

On 19 July 2007 the Tribunals, Courts and Enforcement Act 2007 received royal assent. This Act abolishes the common law right to distrain for non payment of rent and introduces a new procedure for commercial rent arrears recovery. Regulations made under the Act will set out the new procedure in relation to this remedy.

## **15.3 Mortgagee’s remedies**

There are a number of options open to a mortgagee when mortgagors fail to keep up with instalment payments under a mortgage.

### **15.3.1 Action for money due**

The mortgagee can sue for the money due once the date for repayment has arrived. This is unlikely to be the best remedy for the mortgagee unless perhaps the mortgagor has

substantial other assets and the value of the property mortgaged has fallen below the amount owed. More often the mortgagee will use other powers to enforce a sale and then, if there is a shortfall, sue the mortgagor for the difference.

An action by a mortgagee for arrears of interest is statute-barred after six years from the date on which the interest became due (Limitation Act 1980, s.20 (5)). Actions to recover the principal are statute barred after 12 years from the date on which the right to receive the principal debt accrued (Limitation Act 1980, s.20 (1)). However the mortgagee will still be entitled to enforce the security by an order for sale or by an order for possession, and it can recover the debt out of the proceeds of sale, even if an action to recover the principal and/or interest is statute-barred: *West Bromwich BS v Wilkinson* [2005] UKHL 44 and *National Westminster Bank Plc v Ashe* [2008] EWCA Civ 55. Note too that time may run again for recovery of the debt if the mortgagor acknowledges it: Limitation Act s.29, s.30 and *Bradford & Bingley v Cutler* [2008] EWCA Civ 74. Even if a claim for mortgage interest is statute-barred, a mortgagor who wishes to redeem the mortgage will only be allowed to do so if the whole debt and any outstanding interest is paid: *Holmes v Cowcher* [1970] 1 W.L.R. 834).

### **15.3.2 Foreclosure**

A mortgagee can apply for an order for foreclosure when the mortgagor is in breach of obligations under the mortgage which provide that the principal sum secured under the mortgage becomes due. If a foreclosure order is granted and made absolute, the legal title to the mortgaged property is automatically transferred to the mortgagee and the mortgagor loses all rights in the property. So in a subsequent sale of the property any proceeds above the amount owed under the mortgage can be retained by the mortgagee. The LPA 1925 s.88 (2) and (6) deals with the effect of foreclosure on freehold mortgages, and mortgages of leasehold property are governed by the LPA 1925, s.89 (2).

Because of the potential unfairness to the mortgagor, foreclosure is a procedurally cumbersome remedy and there is uncertainty for the mortgagee. An order can be set aside even after it has been made absolute (*Campbell v Holyland* (1877) 7 ChD 166). Also the mortgagor can apply for, and the court readily grants, an order substituting an order for sale for the foreclosure (LPA 1925, s 91(2)). This means that the mortgagor receives any proceeds of sale left after discharging the debt, costs and expenses of sale in the same way as if the mortgagee had exercised its powers of possession and sale in the first place. For these reasons foreclosure is rarely used by institutional lenders.

### 15.3.3 Possession

Many institutional lenders' standard mortgage conditions give the mortgagee a right to possession of the property without there being any breaches of the mortgagor's obligations. It is very rare that a mortgagee will enforce the right to possession without there being arrears of repayment instalments and without having obtained an order for possession. The right to possession is usually exercised only as a preliminary step to exercising the power of sale. However, in a potentially far-reaching decision, *Ropaigealach v Barclays Bank plc* [1999] 3 WLR 17, the Court of Appeal reasserted the view that as mortgagees were entitled to possession, they could use their common law right to re-enter the property peacefully and take possession, and that s 36 of the Administration of Justice Act 1970 had not extinguished this right. However, even if a mortgagee can take possession without a court order, it would be unwise to do so if the premises are occupied, in case it is charged with committing an offence under s.6 of the Criminal Law Act 1977.

If there are arrears outstanding, the mortgagee will usually be granted an order for possession unless (rarely) the mortgagor successfully applies to have the mortgage set aside for, for example, undue influence, or (much more commonly) the mortgagor can

claim the benefit of one of the statutory regimes which provide some protection (Administration of Justice Act 1970, s 36, for residential occupiers of 'dwelling houses' or the Consumer Credit Act 1974, as amended by the Consumer Credit Act 2006 for commercial or residential 'regulated agreements').

Under s 36, possession will be suspended if the mortgagor can satisfy the court that the arrears on the instalments due (not the principal sum secured) are likely to be paid, or breach of any other obligation is remedied, within a 'reasonable time'. If so, then under s.36(2) and (3), the court may adjourn the proceedings, or stay or suspend execution of a judgment or order for possession, or postpone the date for delivery of possession, for such period or periods as the court thinks reasonable, and subject to such conditions in relation to payment of the mortgage instalments or the remedying of any default as the court thinks fit.

S. 8 of the Administration of Justice Act 1973 enlarged the protection given to a mortgagor by s.36. It provides that where the mortgagor is allowed to repay the principal debt by instalments, but there is a provision for accelerated payment (for example in the event of demand or default in the payment of one or more instalment), then the amount "due" for the purposes of s.36 is limited to the amount of the instalments in arrear, rather than the full amount due under the mortgage.

What amounts to a reasonable time will depend on the facts of each case; it can include the time it would take for the mortgagor to sell the property to discharge the arrears (*Target Home Loans Ltd v Clothier & Clothier* (1993) 25 H.L.R. 48). However the court order must define the period of postponement or suspension of possession because there is no power under s.36 to postpone possession for an indefinite period. In deciding what is a reasonable period, the court can take the remaining term of the mortgage as its starting point (*Cheltenham and Gloucester Building Society v Norgan* [1996] 1 W.L.R.

343).

### 15.3.4 Sale

The power of sale is the mortgagee's primary remedy, as it enables it to sell the property and discharge the sums due out of the proceeds of sale. A power to sell is implied into every mortgage made by deed (see LPA 1925, s 101). The power of sale can be, and usually is, exercised without the need for a court order and this has been held to be not incompatible with the mortgagor's rights under the European Convention on Human Rights (see *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327).

The exercise of that power is conditional upon any one of the following requirements being satisfied (see LPA 1925, s.103):

- (a) that a notice requiring payment of the mortgage money has been served on the mortgagor and there has been a default for three or more months in the payment of part of it or all of it; or
- (b) the interest payments must be two or more months in arrears; or
- (c) there must be a breach of some provision of the mortgage deed other than the covenant for payment of the mortgage money or interest.

One advantage of a sale over foreclosure is that the power to sell is generally exercisable without a court order.

Once possession is obtained, it is usually not necessary to obtain a court order to sell the mortgaged property.

The mortgagee in possession owes the mortgagor a duty of care in relation to the property while in possession and in relation to carrying out the sale, although the extent of the duties is not entirely clear. There is a duty to take reasonable care to obtain a "proper price", which effectively means "the best price reasonably obtainable" (*Parker-Tweedale v Dunbar Bank plc* [1991] Ch 12; *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch

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949; *Garland v Ralph Pay & Ransom* (1984) 271 EG 106; *Morgan v Lloyds Bank plc* [1998] 3 Lloyd's Rep 73 and *Downsview Nominees Ltd v First City Corp Ltd* (1993) A.C. 295).

In fixing the price, there will always be an acceptable margin of error and, in the absence of a specific purchaser willing to buy the property at a higher price, a mortgagee will not be in breach of its duty provided the price agreed falls within the acceptable bracket: see *Michael v Miller* (2004) EWCA Civ 282, *Dean v Barclays Bank Plc* (2007) EWHC 1390 and *Freeguard v Royal Bank of Scotland (No 3)* (2005) EWHC 978.

In relation to timing, the power of sale can be exercised at any time, but the mortgagee must not sell without taking appropriate steps to secure the best available price at the time in question, and must ensure a proper exposure of the property to the market: *Predeth v Castle Phillips Finance Co Ltd* [1986] 279 E.G. 1355. Provided the mortgagee acts in good faith and fairly towards the mortgagor, there is no duty to wait until market conditions improve (see *Bank of Cyprus (London) Ltd v Gill* [1980] 2 Lloyd's rep 51 and *Palk v Mortgage Services Funding Plc* [1993] 2 W.L.R. 415. See also *Bell v Long* (2008) EWHC 1273.

Conduct of the sale can be given to the mortgagor (*Cheltenham and Gloucester plc v Booker* (1997) 29 HLR 634).

A mortgagee is entitled to recover all costs, charges and other expenses which are properly incurred in the course of the sale or the attempted sale of the property (see LPA 1925 s.105). This is in addition to the principal debt and any interest due on that debt.

If a mortgagee is in breach of its duty to sell at a proper price, then it will be liable to the mortgagor for damages representing the difference between the actual sale price and the price it could have obtained, or alternatively the debt owing to the mortgagee will be reduced by this amount.

An order for sale can also be made by the court under the LPA 1925, s.91, and this is primarily used by equitable mortgagees or chargees or by the mortgagor. The court also has power to vest the legal estate in the new purchaser (or the mortgagee) by virtue of s.90 of the LPA 1925.

### **15.3.5 Appointment of a receiver**

There is a power to appoint a receiver in the case of all mortgages made by deed (see LPA 1925, s 101). In the absence of a deed a mortgagee may still apply, in appropriate cases, for a receiver to be appointed. An LPA receiver is deemed to be the agent of the mortgagor.

### **15.4 Order for sale under the Trusts of Land and Appointment of Trustees Act 1996**

Trustees for the sale of land enjoy all the powers of an absolute owner of the land (s.6 Trusts of Land and Appointment of Trustees Act 1996), although they must exercise those powers in the best interests of the beneficiaries under the trust. By s.11 of the 1996 Act, beneficiaries entitled to an interest in possession in the land have the right to be consulted, so far as practicable, in relation to the exercise of any function relating to land subject to the trust. Beneficiaries may also have a right to occupy the land in the circumstances set out in s.12 and s.13 of the 1996 Act.

An application to the court for an order in relation to the trust can be made by any trustee of land or the proceeds of sale of the land, or by any person who has an interest in the property which is the subject of the trust (s.14 of the 1996 Act). Although this obviously includes beneficiaries, it is not limited to such persons. By s.14(2), the court has power to make any order it thinks fit in relation to the exercise of the functions of the trustees, including an order relieving them of any obligation to obtain the consent of, or to consult, any person, or an order declaring the nature and extent of a person's interest in the

property subject to the trust.

The factors that the 1996 Act require the court to take into account in deciding whether to order a sale are based on the case law which developed interpreting the old s 30 of the LPA 1925. Those principles are, to a large extent, codified in s.15 of the 1996 Act, which provides that the matters to which the court should have regard include:

- (a) the intentions of the persons who created the trust;
- (b) the purposes for which the property subject to the trust is held;
- (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home; and
- (d) the interests of any secured creditor of any beneficiary.

The wishes and circumstances of any beneficiaries can also be taken into account in the circumstances set out in s.15 (2) and s.15 (3).

Case law decided under s.30 of the Law of Property Act 1925 should be treated with caution and may be of very limited value (*The Mortgage Corp v Shaire* (2000) 1 F.L.R. 973). Where the application for sale is brought by the trustee in bankruptcy, s.355A of the Insolvency Act 1986 sets out the factors that the court will take into account. There have been a great many cases which demonstrate how the courts apply these factors when considering the competing needs of the secured creditors against those of the bankrupt and his/her family. In some cases, an order for sale may be postponed where it would cause exceptional hardship to the bankrupt family (see, for example, *Martin-Sklan v White* [2006] EWHC 3313) and *Re Haghighat* (2009) EWHC 90).

## 15.5 Easement

Where there is an infringement of an easement, a claim for an injunction and/or damages may be brought. The claimant may also ask for a declaration as to the extent or scope of an easement (*Lomax v Wood* [2001] 1 All ER 80). In extreme cases the remedy of

abatement may be used (see *Lagan Navigation Co v Lambeg Bleaching, Dyeing & Finishing Co* [1927] AC 226). This is a self-help remedy usually consisting of removing the obstacle complained of.

## **15.6 Registered land**

The usual remedy for people who claim they have suffered loss as a result of an omission of their interests in the records at the Land Registry is to apply for financial compensation from the Land Registry itself (Land Registration Act 1925). However, on 13 October 2003 the 1925 Act was repealed and replaced by the Land Registration Act 2002. The new Act provides for the appointment of an independent adjudicator.

If the loss is as a result of failure to register, rather than a mistake at the Registry, there may be a professional negligence claim against those who handled any dealings with the interest.

An application can be made to rectify the register to ensure that for the future it includes the interest claimed (LPA 2002 Sch 4). The court can make an order for alteration of the register to correct a mistake, bring the register up to date or to give effect to any estate, right or interest excepted from the effect of registration. The Registrar also has power to alter the register without a court order in the circumstances set out in Sch 4, Para 5. It is unlikely that rectification would be ordered where the result would adversely affect the title of the registered proprietor unless the proprietor has caused or contributed to the error by fraud or negligence or there are other special circumstances which make it unjust not to rectify (see Sch 4 Para 3 and 6.).

Note that the Land Registration Act 2002 changed the position on adverse possession. After 13 October 2003 the Limitation Act 1980 applies to unregistered land only. The Land Registration Act 2002 applies to registered land—a squatter who has been in adverse possession for 10 years may apply for registration in place of the registered proprietor

(see Sch 6 of the 2002 Act).

## 15.6 Exercise

### **PROBLEM**

Mr and Mrs Bowler had a joint mortgage with the Great and Good Building Society. They were two months in arrears in their instalment payments after they both had lost their jobs. At a hearing at the Kingswood County Court they argued that they would be able to pay off the arrears within four years. The district judge rejected their defence and granted possession. The Bowlers moved in with relatives. The building society did not get an order for sale but put the property for sale straightaway. It has been on the market for about six months. The building society has just informed the Bowlers it has had an offer of £45,000 for the property which it is likely to accept. The Bowlers paid £47,000 for the property in 1992. The mortgage was for £44,000. The Bowlers have just sought legal advice. They say they have been told by a friend who is an estate agent that the firm the building society is using have done very little to market the property and that if the property had been well marketed and looked after over the last six months it should fetch over £48,000.

### **SOLUTION**

The Bowlers are out of time to lodge an appeal against the granting of the order for possession (14 days from the order being made) and it does not appear in any case that they would be able to show that no reasonable judge would have granted the order.

The building society did not need to get an order to allow it to sell as it could rely on its statutory power or a power granted in the mortgage.

The building society as mortgagee in possession does owe the Bowlers a duty of care. It is clear that it will be in breach if it does not take reasonable steps to protect the property from, for example, vandalism, but it does not have to repair, redecorate etc to make the property more attractive to potential buyers. The Bowlers may be able to argue that the building society should have rented the property out for the six months and so the property would have been better kept and rental income would have been received (*Brandon v Brandon* (1862) 10 WR 287). However, the building society might well be able to defend such a claim by saying that it was not 'wilful default' not to rent out the property because it might have made it more difficult to sell.

There is a common law duty, and, in the case of a building society, a statutory duty to take 'reasonable care' to obtain the best price for the property (Building Societies Act 1986, Sch 4, para 1(1)(a), *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949). On the facts known at present it is unlikely that the Bowlers could obtain an injunction to prevent sale as there is no clear breach of these duties. They could sue the building society for damages but they would have difficulty both in establishing a breach and showing the measure of loss. The sale was put in the hands of an estate agent. Provided some efforts were made to market the property which were within the broad range of acceptable marketing strategies, it would be hard to show a breach of the duty of care by either the building society or the estate agent. The cases tend to support the view that the lender is not obliged to wait for the market to improve or take special steps to sell the property (*Predeth v Castle Philips Finance Co Ltd* [1986] 2 EGLR 144).

If, which appears unlikely on present information, a claim succeeded, the

damages the Bowlers would receive would be based on what they should have received from the sale if there had been no breach. As this is speculative, the court is traditionally conservative in estimating what price would have been achieved. They would have received the price less the costs of sale (which might have been higher) and the sums owed to the lender as well as the lender's costs. It is likely that if the proposed sale goes ahead the Bowlers will still owe the building society some money. This shortfall would be taken into account in calculating damages.

If the sale goes ahead and there is a shortfall, the building society can sue the Bowlers for that amount notwithstanding the sale. If they have no means, the building society may not think it worth pursuing the claim, at least in the short term.