

Creation of Legal Mortgage on or after 1 January 1926

The LPA 1925 made significant changes to the ways in which mortgages could be created. Generally, the rationale was to allow a mortgagor to retain the fullest interest possible in their own property, provided that the mortgagee had suitable remedies in the event of failure to repay the loan.

Further, a mortgage of a legal estate does not occur through the transfer of the mortgagor's entire interest in land. Instead the mortgagee is given a lesser proprietary interest. Note that since 13 October 2003 (date of entry into force of LRA 2002), legal mortgages of registered titles may be created only by use of a 'charge' and thus the long leasehold method is now only applicable to unregistered land.

Legal Mortgages of Freehold Estates before 13 October 2003

Under section 85(1) of the LPA 1925, there are two methods of creating a legal mortgage of an unregistered freehold estate, and these two methods also could have been used to create a mortgage of a registered title before the entry into force of the LRA 2002.

The long lease method

The first method is where the mortgagor grants the mortgagee a long lease over the land with a provision for the termination of the lease on repayment of all sums due under the loan. The mortgagor will 'demise a term of years absolute' to the mortgagee 'subject to a provision for cesser on redemption'.

- Typical case – mortgage lease 3000 years, however the contract will fix an earlier contractual date for repayment and redemption.
- This earlier date is usually 6 months after execution.
- As was the case before 1925, the mortgagor has an equitable right to redeem the mortgage, and thereby to terminate the long lease on payment of all sums due at any time after this legal date has passed.

The grant of exceptionally long lease to the mortgagee have a number of important consequences:

1. The mortgagor retains the legal fee simple throughout the term of the mortgage.
2. The mortgagee acquires some proprietary interest in the land, being the leasehold granted to them. This preserves the efficacy of their remedies in the event of non-payment of the mortgage debt.
3. The mortgagor may create further legal mortgages of his land, in order to raise further sums. The term granted to the second mortgagee will necessarily always be longer than that granted to the first, as this gives the second mortgagee a notional legal interest in the property distinct from that of the first mortgagee. The actual sum lent on the second mortgage will be calculated by reference to the value of the land, taking account of the debt owed under the first mortgage, but again the mortgagor retains the ultimate fee simple and the second mortgagee also receives a proprietary interest in the land.

The charge

The second method of mortgaging registered titles (before and after entry into force of the LRA 2002) and unregistered titles is the charge by deed (sections 85(1) and 87 of the LPA 1925). This is a much simpler method of creating a mortgage than executing a long lease. Since the entry into force of the LRA 2002, it is the only method of mortgaging registered titles.

and part performance of that contract under the then operative section 40 of the LPA 1925. The borrower was protected because it held the documents of title, so preventing the borrower from further dealing with the land.

This was an efficient way of creating a mortgage and the mortgagee was protected because it held the documents of title, so preventing the mortgagor from further dealing with the land. After 1989, however, contracts for the disposition of any interest in land (i.e. to create a mortgage) must be in writing and this cannot be presumed to exist from the deposit of title deeds.

Some argued that the enactment of section 2 of the 1989 Act was not intended to do away with this informal method of creating equitable mortgages, the Court of Appeal in *United Bank of Kuwait v. Sahib* (1996) has confirmed that deposit of title deeds is an attempt to create a mortgage by unwritten contract and is therefore void. No such mortgage can be created.

However, mortgages created by the deposit of title deeds after 27 September 1989 are void.

Mortgages by estoppel

Proprietary estoppel operate to give a claimant an interest in land even though the claimant cannot produce the deed or written instrument that is normally required to establish a proprietary right.

Jennings v. Rice and cases before it - court has an equitable jurisdiction to grant the remedy that is necessary to remove the unconscionability that triggered the estoppel – sometimes described as the minimum equity to do justice between the parties. There is no reason why this remedy should not be such so as to give the claimant an equitable mortgage over the defendant's land, even despite the absence of formality.

Taylor Fashions v. Liverpool Victoria Trustees (1982) – if one person promises an interest in land to another, and that is relied upon to their detriment, equity will enforce the promise and can give effect to the claim of the promisee.

Where a lender advances money on the basis of a promise (orally or by conduct), it is possible that the 'mortgage' will be enforced despite absence of formality. Estoppel can be used in these circumstances because it would be unconscionable to deny the mortgage. In **Kinane v Alimamy Mackie-Conteh (2005)**, the Court of Appeal held that the claimant had a mortgage by estoppel because he had lent money to the defendant on the faith of an assurance that a valid mortgage would be forthcoming, even though the parties did not comply with section 2 of the 1989 Act (it was signed by the mortgagor but not the mortgagee).

Equitable charges

Equitable charge - informal way of securing a loan over property. This requires no special form of words, only an intention to charge property with a debt (**National Provincial and Union Bank of England v. Charnley (1924)**). It is extremely precarious and not often used deliberately for either commercial or residential mortgages.

Murray v. Guinness (1998) suggests that because such a charge does not technically involve a disposition of an interest in land, it need not comply with section 53(1)(c) of the LPA 1925. However, whether this means that no written formalities are required at all has been questioned – without any conclusive answer – in **Kinane v. Alimamy Mackie-Conteh (2005)** where Arden LJ ponders whether such a charge might nevertheless fall within section 2 of the LPA 1989 and thus require a written instrument under this statute.

Problem with equitable mortgages and equitable charges over land

like effect. However, if the sale proceeds would not pay off the whole debt – as in *Palk* itself – section 36 is inapplicable and so the suspension of the mortgagee's possession in *Palk* seems to have derived from the wide discretionary power found in section 91 itself. This is a novel use of section 91, and in *Cheltenham & Gloucester BS v. Krausz*, the Court of Appeal appears to have held that there is no power to suspend a mortgagee's possession unless section 36 could be used. Yet, *Krausz* does not overrule *Palk* (itself followed in *Lloyds Bank v. Polonski* (1999)), because *Palk* is said to be limited to its 'special facts'. In fact, the distinction drawn by the court in *Krausz* between it and *Palk* is not convincing and, while at present the balance of authority favours the narrow *Krausz* view, the matter is not yet finally determined. Therefore, for the present, if the mortgagor applies for sale under section 91 of the LPA 1925, there may be an opportunity for the court to utilise an ancillary power to suspend a mortgagee's possession order while the sale takes place, whether or not the sale would pay off the entire debt.

3. *Albany Home Loans v. Massey* (1997) establishes that a mortgagee cannot be granted possession of land mortgaged by joint mortgagors where, in fact, the mortgage turns out to be binding on only one of them. In that case, the mortgage of the house had been executed by the man and woman jointly and they were in default. However, the mortgage was held void as against the woman on the grounds of undue influence. In consequence, possession of the land could not be ordered, even though the man would remain living on the land with his partner. Note, however, that the mortgagee may still apply for a forced sale of the land under section 14 of TOLATA 1996 which, if successful, will result in the land being sold and the innocent mortgagor receiving their equity as a first call on the proceeds of sale – see for example, *First National Bank v. Achampong*. Undue influence, the mortgage will not be totally ineffective, there will be an effective mortgage of the husband's beneficial interest in the property. Relied on s.63(3) of the LPA.
4. There are other statutory restrictions on the mortgagee's right to possession, which arise in very particular circumstances. These include attempts by the mortgagee to gain possession outside the time limit set by the Limitation Act 1980 (*National Westminster Bank v. Ashe* (2008)) – The borrower remained in possession for more than 12 years after the bank's right to possession had arisen. Consequently, the mortgage was extinguished under sections 15 and 17 of the Limitation Act 1980. Or in contravention of the Consumer Credit Act 1974 (as amended), the Rent Act 1977 and the Housing Acts 1985–96, or contrary to the dictates of the insolvency legislation.
5. It remains to be seen whether a mortgagor can claim that the mortgagee's exercise of the right of possession contravenes the borrower's right to peaceful enjoyment of their property or their right to family life guaranteed by the European Convention on Human Rights as implemented in the United Kingdom by the Human Rights Act 1998. Such an argument is tenable (*Barca v Mears*) and the law of human rights is dynamic and still of uncertain scope in its relationship with English land law. On the other hand, a mortgagee's claim to possession is in pursuit of their legitimate rights under the mortgage, especially if such possessory rights are a proportionate response to the mortgagor's default. At present, the tenor of decisions in related issues surrounding possession is against the success of this argument.

Appointment of a receiver

The mortgagee may also appoint a receiver to manage and administer the mortgaged property, and possibly sell, in order to recover monies owed. The right to appoint receiver is often expressed in mortgage contract, but in any event, such a power will be implied in every mortgage by deed under section 101 of the LPA 1925.