

Mortgagees: Can they just sell?



At common law and under the Conveyancing Act, a mortgage over unregistered land meant that mortgaged land was transferred to the mortgagee (the lender). In fact, at common law, if the mortgagor (the borrower) failed to redeem his or her property on the day fixed by the agreement to do so, then the interest that the mortgagee had in the mortgaged land became absolute and the mortgagor's interest in the land was extinguished. With that in mind, many would agree that one of the important changes brought about by the Registration of Titles Act ('ROTA') was that a

mortgage over registered land did not operate as a transfer of the land to the mortgagee, but simply acted as a security. Despite this significant move to protect the mortgagor of registered land, the UK Privy Council (Jamaica's final court of appeal) has recognized that, unlike some legislation that was passed to embody a policy of consumer protection, ROTA's clearest goal was to provide an efficient system of conveyancing, "rather than social legislation to give mortgagors a degree of protection against mortgagees which they did not have at common law or equity."

As a form of security, a mortgage gives the mortgagee certain rights and powers over the mortgaged property and these include:

1. The right to grant leases (This power is only exercisable when a mortgagee is in possession of the property or where it has appointed a receiver);
2. The right to appoint a receiver to manage the property to realize, among other things, the payment of the sums owed to the mortgagee;
3. The power to foreclose; and
4. The power to sell the property by public auction or private treaty.

The mortgagee's power of sale is often one of the most challenged in the courts, as many mortgagors as registered proprietors of property often have ties that can only be described as emotional to their property and therefore rue the day they are made to part with it, even if it is as a result of their own delinquency in honouring payments to the lender.

ROTA provides that if a mortgagor defaults in his or her covenant to pay the principal sum or interest or defaults in the performance of any other covenant in the mortgage and the default continues for one month, then the mortgagee may give notice to the mortgagor in writing to pay the

money owing or to perform or observe the covenants. If the default continues from one month after the service of the notice then the mortgagee may sell the mortgaged property. The UK Privy Council has made it clear that a mortgagee may even contract out the statutory requirements to give notice to the mortgagor. The mortgagee's powers therefore seem vast.

Are there limits to the mortgagee's power of sale?

Desperate and delinquent mortgagors when faced with the sale of their properties by the lender often sue the mortgagee and in that action seek to have the court restrain the lender from exercising its power of sale. However, the Jamaican Court of Appeal's decision in the case of **SSI (Cayman) Ltd and ors. v. International Marabella Club**, which has recently been described as a 'formidable judgment available to mortgagees', decided that where there is a dispute between the mortgagor and the mortgagee over the sum owed, then the mortgagor seeking an injunction to restrain the mortgagee from exercising the power of sale must pay into court, the sum claimed by the mortgagee.

The jurisprudence underpinning the decision in **Marabella** is that if the mortgagee is wrong about the amount owed to it, then the mortgagor has a remedy in damages. In other words, if the mortgagee wrongfully sells the mortgaged property, then the mortgagor can be compensated by money, therefore no injunction would lie to prevent the sale of the mortgaged property.

In the case of **Flowers Foliage and Plants of Jamaica Ltd. v. Jamaica Citizens Bank Ltd.** the Court of Appeal did appear to limit the application of the **Marabella** principle and decided that the 'justice of the case' demanded a different approach. **Flowers** and a recent decision in the Supreme Court suggest that if the mortgagor (in trying to restrain the mortgagee's power of sale) raises issues that question the enforceability of the agreements signed between mortgagee and mortgagor then the court may not hold hard and fast to the principle laid down in **Marabella** to require the mortgagee to pay the entire sum claimed by the mortgagee into court before it would restrain the mortgagee. Instead the court may grant the mortgagor's application for an injunction, but may mould its order to ensure adequate protection for the mortgagee. One way in which the court may do this is to order the payment into court of the interest or any expenses associated with the mortgage less the principal sum claimed.

So there in fact seems to be some limit to the mortgagee's power of sale – but please note- it is not enough for the mortgagor to say to the court: "I do not owe that amount..." If a mortgagor hopes to restrain a mortgagee from exercising its power of sale, he or she has to present cogent

evidence to show that there is a serious issue to be tried by the court in respect of the enforceability of the mortgage agreement.

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