



HEIDTMAN & CO.

LAWYERS

DUTIES OF MORTGAGEES

What Duty Is Owed By A Mortgagee To A Mortgagor In Exercising A Power Of Sale?

(A) Firstly, there is no cause of action known to the common law based on a reckless, willful or negligent conduct of the mortgagee sale leading to a sale at gross undervalue.



(B) The proper remedy of the plaintiff is a suit in equity.

Pendelbury v Colonial Mutual Life Assurance Society Ltd (1912) CLR is the current state of the law and has been for 80 years. It states:

Mortgagee owes no duty of care to the mortgagor, so long as he is bona fide acting within the limits of power.

Content Of The Equitable Duty

Taking reasonable precautions can be regarded as one aspect of the duty to act in good faith.

Duty not to either fraudulently or willfully or recklessly sacrifice the property of the mortgagor, are covered by this formulation... difficult to define exhaustively.

Wide latitude has been allowed to mortgagees in the manner of exercising their power of sale because:

A mortgagee's power of sale exists to assist a mortgagee to release a security and that so long as the mortgagee exercised the power in good faith and for that purpose, and does not recklessly or willfully sacrifice the mortgagor's interest, there is no reason to interfere with the exercise of the power of sale, even if the property is sold under value.

Is The Duty Different Where The Mortgagor Is A Corporation? Section 420A Corporations Act 2001

(1) In exercising a power of sale in respect of a property of a corporation, a controller must take all reasonable care to sell the property for:

- (a) if, when it is sold, it has market value – not less than that market value;
- or



- (b) otherwise, the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.

The Corporations Act imposes a more strenuous standard of conduct than that imposed by the common law on mortgagees or persons exercising a power of sale where a corporation does not own the property.

A mortgagee of a corporate property may be liable in negligence to the company as it is likely that a controller owes a general duty of care to the company in respect of the sale of the property to a charge.

It is expected that the common law will at some stage be brought into line with the statutory tests laid down in Section 420A of the Corporations Act.

Is A Similar Duty Owed To A Guarantor?

It is assumed that a duty of good faith is owed by a mortgagee exercising a power of sale to a guarantor of mortgagor's obligations, but this is not set law.

Is A Duty Owed To A Co-Borrower?

The history and nature of the mortgagee's duty shows that the duty is owed to those with subsequent interest in the secured property. This class does not include a co-borrower.

The relationship between a banker and a customer is essentially contractual in nature and a banker's duties to a customer are dictated by the nature of that contract.

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There is no basis in principle to extend such a duty to a co-borrower who has no interest in the security property. It is submitted that a co-borrower is to be distinguished from a guarantor because co-borrower's obligations do not rely in any respect upon the relationship between a lender and a mortgagor.

When Can A Mortgagee Sell?

Basic Rule

The mortgagee can sell at any time.

However:

Extreme circumstances

In some circumstances a sale may have to be delayed if there were very clear signs the market was improving rapidly and



substantially

Normal circumstances

A mortgagee may sell even if the price obtained was below market value and better price could be obtained by waiting.

Can The Mortgagee Rely Upon The Appointment Of An Agent To Discharge Its Duty?

Can not rely on an agent to discharge the duty of a mortgagee.

Appointment of a reputable real estate agent by the mortgagee to conduct the sale does not excuse the mortgagee for improper acts of the agent.

One way to protect a mortgagee's position against a claim by a mortgagor that the mortgagee was liable for the

negligent acts of the agent, is to extract an indemnity from the selling agent at the time of his appointment.

Methods Of Sale

Provides that a mortgagee may sell land mortgaged or any part thereof by public auction or by



private treaty.

A mere sale by private treaty as opposed to auction can not constitute a breach of duty.

Advertising

A mortgagee is not entitled to sell by public auction without there being adequate advertisement.

Reason

In order to secure a "fair price" for the property by means of competition. The object of giving public notice of a sale by auction (through advertisements) is to induce such competition as will be likely to secure a "fair price". Must give all particulars including the following:

- place of auction



Development potential of the property.

Disclosure Of Reserve Price

Disclosure of the reserve price is regarded as an element, which shows the mortgagee's total disregard for the mortgagor's interest.

Cannot disclose the reserve price.

Setting a reserve price

Must be such that, whilst it is designed to fetch a proper price, it does not at the same time willfully or recklessly sacrifice the mortgagor's interest.

Remedy For Breach Of Duty

The power of sale is an equitable power. So where a power of sale has been completed, a mortgagor's remedy lies in proceedings for accounts.

The proceedings for accounts would be upon the basis that a mortgagee ought to be deleted with sums in excess of what it obtained and the mortgagor is to be credited with sums which the mortgagee ought to have received, if it had exercised the power of sale properly.

Where a power of sale has not been exercised, but a mortgagor apprehends that the power is proposed to be improperly



exercised by a mortgagee, then a mortgagor is entitled to an injunction to prevent the sale from proceeding.

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