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Introduction

A mortgage loan or mortgage serves the real property purchasers, such as home, to raise funds to purchase property; or otherwise by existing real estate owners to raise funds for any use, while putting the right to take another's property being mortgaged if an obligation is not discharged. The very nature of the mortgage is that terms of the debts' repayment are defined in the contractual document, which also integrates specific rights and remedies, along with the lender's rights if the mortgagor is unable to repay the capital. If these are the situations, there are lots of remedies for the lender to enforce payment. Some of these remedies are principally directed to getting the due mortgaged money back and putting an end to the security, whilst taking possession and appointing a receiver are other two remedies¹. The researchers' arguments about the arrears when faced by the mortgagor is that the lenders, such as bank, do all they can so that they can avoid repossession of the property or home, but if it has to ensure their security, problematic questions at the social level emerge as the borrower has given his home as the purpose of security instead of investment². This is quite a relevant issue especially in the modern-day economic environment, where around 40,000 homes were taken back in 2011³. So, one of the major issues emerging in these circumstances is whether or not there are rights and remedies that protect borrowers from being unjustifiably dispossessed from their home by the lender. Thus, the purpose of this essay is to critically discuss to what extent the rights and remedies of the borrower provide protection to them from being unjustifiably dispossessed of their home by the lender.

Discussion

The consideration was that the Administration of Justice Acts (AJA) 1970 and 1973 was implemented with the intention to let a borrower who facing problems in making sure the repayment of the mortgaged money before the lender unjustifiably dispossesses of their home, so as to get his financial matters in order⁴. Nevertheless, this specific intention or objective of providing protection to the borrowers has not been employed in a consistent manner when the their discretions are exercised by the law courts according to the pertinent law provisions,

¹Nettleton, Sarah, and Roger Burrows. "Families coping with the experience of mortgage repossession in the 'new landscape of precariousness'." *Community, Work & Family* 4, no. 3 (2001): 253-272.

²Burn, Edward Hector, John Cartwright, and Ronald Harling Maudsley. *Maudsley & Burn's Land Law: Cases & Materials*. Oxford University Press, USA, 2009.

³King, Jane, and Mary Carey. *Personal Finance: A Practical Approach*. Oxford University Press, 2013.

⁴Bray, Judith. *Unlocking land law*. Routledge, 2016.

particularly section 36 of the 1970 Act as modified by section 8 of the 1973 Act) and when they resolve the borrower's and lender's competing interests⁵.

Nevertheless, Section 36 of AJA 1970, as modified by the section 8 of AJA 1973, is not available where the possession proceedings are avoided by the lender and looks for enforcing its security devoid of a court order, by means of instantaneous sale. This can be done when the right is used by a lender to sell by ignoring a court order. Lender can do it either by: a contractual term can be there to that effect or an implied statutory right is there to trade by virtue of section 101(1) of the Law of Property Act 1925 (LPA)⁶.

Horsham Properties Group Ltd v Clark⁷ was the case in which the lenders had an implied legal authority to sale as per the section 101(1) of the LPA 1925 because of the default of the borrowers. The mortgagee aimed to sell the property so that their security could be released. This case emerged when the Human Rights Act (HRA) 1998 was emerged. The argument of borrowers was that the claim of possession and consequent sale of their home to any third parties violated the Convention rights declared in the HRA. In this particular case, a very major argument was that Article 1 First Protocol which given the right to non-violent and passive process of property possessions was invaded⁸. The argument by the borrower was given by revealing the equity of redemption was a real estate possession according to the Article and they were disadvantaged of this by the state which was unfavourable to the public. However, this argument was refused by the court. It was acknowledged by the court that the equity of redemption of the borrower was a possession as per the Article; however, the concluding remarks of the court were that they had misplaced the redemption right through the contract's operation instead of any decree. This judgment has an effect, that is, if the borrower is facing the issue of debt, the lender has the discretionary right to repossess and sell the home or other property and they do not need any order given by the court. It is confirmed in a case of Wood V United Kingdom: ECHR 2 Jul (1997) that this approach of the lender will not breach any

⁵Bray, Judith. Unlocking land law. Routledge, 2016.

⁶'Law Of Property Act 1925' (Legislation.gov.uk, 2017) <<http://www.legislation.gov.uk/ukpga/Geo5/15-16/20>> accessed 20 January 2017.

⁷Wood, J., 2009. Horsham Properties Group Ltd v Clark: A Year On. Coventry Law Journal, 14(2), pp.31-6.

⁸Thompson, Mark P. Modern land law. Oxford University Press, 2012.

convention rights and the mortgagor will become dispossessed⁹. This case also validated that the HRA 1998 was not aimed to balance the mortgagors' rights by protecting them with more rights and remedies from mortgagees.

For mortgagee or lender, there is a right to repossess the property as a secured creditor but justifiably instead of unjustifiable dispossession of the property¹⁰. As pointed out by Harman J in the case of *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] the lender's discretionary possession right without some contract has nothing to do with the borrower's default in terms of debt. The lender may prefer repossession of the property or residential home before the completion of the time of mortgage contract unless something is integrated in the mortgage, through which the lender has refused such a right¹¹. Nevertheless, in practical applications, possession cannot be pursued without valid justification¹².

If the borrower wants relief and protection from being unjustifiably dispossessed from their home by the mortgage holder, the proceedings may be adjourned by the court, and it stays or suspends the implementation of the ruling or order, or prorrogs the date for possession and delivery according to section 36 of the Administration Act 1970¹³. The court has a wide discretion to deal with the proceedings under this Act. Nevertheless, its jurisdiction will not be exercised by the court unless it determines that the borrower is likely to be capable of repaying the capital due as per the mortgage contract within a reasonable time period, or to remedy any other default according to it¹⁴.

Besides the right provided to the lenders laid out by Harman J, as mentioned above, lenders are further protected where a clause of the default is integrated into the conditional delivery of property as security purpose for loan's repayment, furnishing them the right to sue the borrower albeit the borrower has only lagged behind, about, two instalments of the sum of money. These

⁹Swarb, 'Wood V United Kingdom: ECHR 2 Jul 1997 - Swarb.Co.Uk' (swarb.co.uk, 2017) <<http://swarb.co.uk/wood-v-united-kingdom-echr-2-jul-1997/>> accessed 20 January 2017.

¹⁰Meisel, Franklin. *Property and Protection: Legal Rights and Restrictions: Essays in Honour of Brian W. Harvey*. Hart Publishing, 2000.

¹¹Meisel, Franklin. *Property and Protection: Legal Rights and Restrictions: Essays in Honour of Brian W. Harvey*. Hart Publishing, 2000, p.158.

¹²Meisel, Franklin. *Property and Protection: Legal Rights and Restrictions: Essays in Honour of Brian W. Harvey*. Hart Publishing, 2000.

¹³Mulcahy, Leigh-Ann, ed. *Human rights and civil practice*. Sweet & Maxwell, 2001.

¹⁴Nettleton, Sarah, and Roger Burrows. "Families coping with the experience of mortgage repossession in the new landscape of precariousness." *Community, Work & Family* 4, no. 3 (2001): 253-272.

clauses have dissociated a borrower of the safeguard which the Act was planned to give, which was to serve the borrower by giving reasonable amount of time length, so that the borrower could repay his remaining amount¹⁵. Halifax Building Society v Clark [1973] 2 All E.R. 33 was the case in which this specific clause was dealt with¹⁶. The law court, in this case, had to come to a decision as to whether the mortgaged money due as per the mortgage contract was the real debt, (two repayments of £72.97 in this case) or the complete sum of money which had been obtained. It was held by the court in this case that it was the latter, and on account of this decision given by the court, section 8 of the AJA 1973 was approved. According to the Section 8, the borrower has the right to repay the principal amount protected by instalments or if not to postpone the whole or partial payment. However, the borrower's default or a lender's demand will lead to provision made for earlier payment or if not, then, for the purposes of section 36 of the AJA 1970, a borrower as due may be treated by the court on the grounds of the capital secured and of interest on it only such capital as the borrower would have anticipated to be enforced to reimburse if such provision is not available for earlier payment^{17,18}.

The interests of the parties involved in the mortgage will be deliberated by the court to ascertain the reasonable amount of time length as per the provisions, mentioned earlier¹⁹. Here, the arguments have been found in the cases that the ways its discretion will be exercised by the court will repose on the ground realities of specific cases which may be shaped by the lenders and their diverse practices that reflect fairly wide-ranging responses to instances of mortgage default by borrowers²⁰. Nevertheless, typically the court will take the first step with the complete term of the mortgage and take the borrower's capability into consideration about clearing the entire sum unpaid with the passage of time²¹.

¹⁵Bray, Judith. *Unlocking land law*. Routledge, 2016.

¹⁶Swarb, 'Halifax Building Society V Clark: Chd 1973 - Swarb.Co.Uk' (swarb.co.uk, 2017) <<http://swarb.co.uk/halifax-building-society-v-clark-chd-1973/>> accessed 20 January 2017.

¹⁷Sexton, Roger, and Barbara Bogusz. *Complete land law: text, cases, and materials*. Oxford University Press, 2013, p.686.

¹⁸AJA, 'Administration Of Justice Act 1973' (Legislation.gov.uk, 2017) <<http://www.legislation.gov.uk/ukpga/1973/15/section/8>> accessed 20 January 2017, para.1.

¹⁹Lambrech, Bart, William RM Perraudin, and Steven Satchell. "Mortgage default and possession under recourse: A competing hazards approach." *Journal of Money, Credit, and Banking* 35, no. 3 (2003): 425-442.

²⁰Whitehouse, Lisa. "A Longitudinal Analysis of the Mortgage Repossession Process 1995-2010: Stability, Regulation and Reform." (2010).

²¹Lambrech, Bart, William RM Perraudin, and Steven Satchell. "Mortgage default and possession under recourse: A competing hazards approach." *Journal of Money, Credit, and Banking* 35, no. 3 (2003): 425-442.

The case law, a set of decisions taken in past which made new clarifications of law and, hence, can be referenced as examples, has established in ascertaining the ways the discretionary right, mentioned above, was to be used. The case of *Cheltenham and Gloucester Building Society v Grant* [1993] 25 H.L.R. is one of the case laws in which the court took a firm decision by rejecting to retard by interference the use of a discretionary right possessed by the court judge unless it was taken as being incontrovertibly incorrect²². This approach lacks rigor and strictness and hence obviously did not help out the borrower but the court verdict in a highly crucial case of *Cheltenham and Gloucester Building Society v Norgan* [1996] was accepted. The reason behind its acceptance is that this facilitated by furnishing quite clear and comprehensible guiding principles as to how the courts are imagined to use their discretionary rights when the repossession action of the mortgagee is want to be defended by a borrower²³. In this case the court held that the circumstances and deliberations which are probably to be quite pertinent in ascertaining what establishes reasonable time frame comprise: the sum of money the mortgagor could practically manage to pay for at present in the future; if the borrower is facing problems temporarily in effectively fulfilling his legal repayment obligations, the grounds for the increased debt as the financial obligation; the sum of money due of the original term; the mortgage contract's pertinent terms and conditions and its nature²⁴. It was thought in this case that reasonable amount of time period might reach to the mortgage's full term.

The *Household Mortgage Corporation v Pringle* (1998) 30 HLR 250, CA. was the case in which the above mentioned verdict has since been affirmed again, but the court did not favour the borrower in cases that would facilitate within adequate amount to release the debt²⁵. As for example, the decision taken by the court in the case of *Bristol and West Building Society v Ellis* (1996) 73 P. & C.R. 158, has removed the uncertainty by making it obvious that the quite

²²Peter Jolly, 'How The Mortgage Arrears Protocol Affects Mortgage Proceedings' (Law Society Gazette, 2009) <<https://www.lawgazette.co.uk/law/how-the-mortgage-arrears-protocol-affects-mortgage-proceedings/48900.article>> accessed 20 January 2017.

²³Peter Jolly, 'How The Mortgage Arrears Protocol Affects Mortgage Proceedings' (Law Society Gazette, 2009) <<https://www.lawgazette.co.uk/law/how-the-mortgage-arrears-protocol-affects-mortgage-proceedings/48900.article>> accessed 20 January 2017.

²⁴Peter Jolly, 'How The Mortgage Arrears Protocol Affects Mortgage Proceedings' (Law Society Gazette, 2009) <<https://www.lawgazette.co.uk/law/how-the-mortgage-arrears-protocol-affects-mortgage-proceedings/48900.article>> accessed 20 January 2017.

²⁵Burn, Edward Hector, John Cartwright, and Ronald Harling Maudsley. *Maudsley & Burn's Land Law: Cases & Materials*. Oxford University Press, USA, 2009.

imperative deliberation is the care and protection of the lender's security²⁶. The scenario of this case is that £16,000 was the arrears on the original mortgage of £60,000. The position of Mrs Ellis was that she was able to repay the lender a payment of 5,000 Pounds and easily fulfil the normal modes of repayments and pay 10 Pounds, so that the financial obligation in the form of debt or arrears could be cleared off. On the basis of these facts, it would take Mrs Ellis almost a century (98 years) to reimburse the arrear amount, a time frame which no one asserted could be considered as a reasonable duration within the significance of the Act²⁷. It was proposed by her that the sale of the real estate should be held over for 5 years, so that her son could easily complete his academic and that upon the selling of the home there will be enough sum of money to release her mortgage obligation (debt). However, the Court of Appeal refused her argument by stating that the highly critical and crucial issues are the adequateness of the security for the financial obligation in terms of mortgage arrears as well as the duration of time required to make sure the property's selling. At this stage the importance of presenting evidence is very much that should be presented before the court over the selling possibility will start the proceeding to release the financial obligation of debt and of the time frame wherein such a property sale is probably to be made.

For the loan recipients, one of the consequences due to the court decision taken in the case of Norgan, mentioned above, was that they are anticipated to show rock-solid proof of an accurate budget revealing the ways they will be capable of repaying the arrears whilst abiding by routine repayment mode²⁸. A difficulty has always been found with this requirement. The very first reason behind the falling of borrower into arrears is the loss of an employment²⁹. As far as the modern-day economic situation, the borrower's chances to show the required evidence to persuade the court to delay or interrupt repossession action of the mortgagor as alternative work might be discovered will be quite slight. In this scenario, the alternate option for the borrowers is

²⁶Bray, Judith. *Unlocking land law*. Routledge, 2016.

²⁷Bray, Judith. *Unlocking land law*. Routledge, 2016.

²⁸Peter Jolly, 'How The Mortgage Arrears Protocol Affects Mortgage Proceedings' (Law Society Gazette, 2009) <<https://www.lawgazette.co.uk/law/how-the-mortgage-arrears-protocol-affects-mortgage-proceedings/48900.article>> accessed 20 January 2017.

²⁹Peter Jolly, 'How The Mortgage Arrears Protocol Affects Mortgage Proceedings' (Law Society Gazette, 2009) <<https://www.lawgazette.co.uk/law/how-the-mortgage-arrears-protocol-affects-mortgage-proceedings/48900.article>> accessed 20 January 2017.

selling the home themselves with the intention to discharge the mortgage debt³⁰. Despite anything to the contrary, it is indicated by some contemporary cases that this option is not devoid of problematic issues, as although the borrowers had contract an estate agent to put the property in their hands this does fulfil the requirement³¹. In reality, the arrival of the law had not substantially modified the law substance when the adjournment of a possession order is looked for by a borrower, so that he could sell his property by himself, so as to pay off the arrears of mortgage³².

Besides the above, where the repossession action is taken by the mortgagee without valid justification and order of the court, the court lacks the legal power under the Acts of 1970 and 1973 as the repossession is the mortgagee's right and there is not a single remedy, as settled in the case of *Ropaigelach v Barclays Bank Plc* [1999] 4 All E.R. 235³³. In this case, this court verdict reflected some weak points in the legislation that provides protection to the borrowers who borrowed money for home³⁴. The above mentioned cases highlighted the greatest amount of drawbacks and limitations of the constitutional discretion given to the courts so that they could protect the borrowers have become apparent³⁵.

It has been proposed by Evan that the statutory law must take up two highly relevant problematic matters including the need for the mortgage holder to sue the borrower and get a court decision for repossession in all situations and whether the power to revise mortgage contracts should be given by the court³⁶.

Conclusion

³⁰Peter Jolly, 'How The Mortgage Arrears Protocol Affects Mortgage Proceedings' (Law Society Gazette, 2009) <<https://www.lawgazette.co.uk/law/how-the-mortgage-arrears-protocol-affects-mortgage-proceedings/48900.article>> accessed 20 January 2017.

³¹Thompson, Mark P. *Modern land law*. Oxford University Press, 2012.

³²Thompson, Mark P. *Modern land law*. Oxford University Press, 2012.

³³Evans, Steve. "A Scrutiny of Powers of Sale Arising Under an Equitable Mortgage; A Case for Reining These in." *Browser Download This Paper* (2015).

³⁴Evans, Steve. "A Scrutiny of Powers of Sale Arising Under an Equitable Mortgage; A Case for Reining These in." *Browser Download This Paper* (2015).

³⁵Evans, Steve. "A Scrutiny of Powers of Sale Arising Under an Equitable Mortgage; A Case for Reining These in." *Browser Download This Paper* (2015).

³⁶Evans, Steve. "A Scrutiny of Powers of Sale Arising Under an Equitable Mortgage; A Case for Reining These in." *Browser Download This Paper* (2015).

At present, housing lenders have the right to expel mortgagor (occupying borrower) from his home and they do not need any court order if the borrower fails to meet a financial obligation. This can be done through the mortgagee manipulation of the loan deed's provisions. It is confirmed in the case of Horsham Properties Group that the mortgage companies can do the action against the borrower devoid of any court notice and order. In a report named as Transfer of Land – Land Mortgages published in 1991 by the Law Commission³⁷, in which they propose different changes but unfortunately the Parliament do not focus on it. Unless these proposals are understood and enacted, residential borrowers will have to count on the court and their discretionary verdicts as per the AJAs 1970 and 1973 to their support.

³⁷Law Commission, 'Transfer Of Land - Land Mortgages - Publications - GOV.UK' (Gov.uk, 1991)
<<https://www.gov.uk/government/publications/transfer-of-land-land-mortgages>> accessed 20 January 2017.

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