



DAVIS LAWYERS

Legal Insights

DUTIES OF MORTGAGEE EXERCISING POWER OF SALE

This paper discusses some issues which face a mortgagee who wishes to exercise power of sale of a property.

1. Taking action to exercise power of sale does not preclude other action being taken. For instance, this means that action can be commenced to sue the debtor/a guarantor for the money owed.
2. If the security property is occupied by the registered owner or a builder, you need to obtain possession. This requires a demand for possession and if that is unsuccessful, a Court application is required. If the application is defended, it can take a minimum of 3-4 months to obtain the appropriate order and if the owner still refuses to go, it can take a further month or so to have the Sheriff remove them. All up, the process can take upwards of around 6 months.
3. If a property is tenanted, you have the option of entering possession by directing that rent be paid to you. If you take possession, then you should ensure the property is insured. If the tenancy was entered by the registered owner after the mortgage was granted, then the mortgagee has the option of whether or not to consent to tenancy agreement. If the mortgagee does not consent to it, the tenant can be given notice to leave and if it is a residential tenancy, the procedures under the *Residential Tenancy and Rooming Accommodation Act* must be followed to obtain vacant possession.
4. If a security property is vacant, you do not have to obtain possession. All that is required is to give a notice to the registered owner of the property that the default has occurred and that the mortgagee has entered possession.
5. In relation to vacant land, "entry into possession" is straight-forward. We normally recommend against that, since other obligations flow from this action – for instance, liability in relation to contamination and occupier's liability.
6. If the mortgagee enters possession, it needs to take out insurance – public liability and building insurance to cover any improvements.
7. If you ultimately sell the property as mortgagee exercising power of sale, the transfer to the buyer is not signed under power of attorney, but rather as "mortgagee exercising power of sale under mortgage no ###".
8. The following procedural matters need to be considered in relation to a mortgagee sale.

LEGAL INSIGHTS – MORTGAGEE SALE

- (a) In order for you to sell the property, you do not have to transfer the property into your name.
- (b) Issue a Form 4 – notice of exercise of power of sale (in Queensland) or a default notice (in other States, which complies with statutory obligations), to the owner of the property, with a demand for payment – by either registered post or preferably personally by a process server.
- (c) Completion of the sale cannot occur until after 30 days has expired after service of the notice. Usually, this notice is serviced and the auction does not occur until after the time has elapsed.
- (d) Send a copy of the covering letter and notice to all borrowers, guarantors and each prior and subsequent mortgagee (if any).
- (e) Contact prior mortgagees for confirmation of the amount of their payout, as at a proposed auction date - usually your “privacy” form which is typically completed with the loan application form, contains an authority for you and other lender’s to release such information.
- (f) Obtain a valuation of the property from a valuer who is not involved in the sale process.
- (g) Obtain proposed marketing campaigns from two or three local agents – these need to be costed and include details of all advertising, including site signs.
- (h) These agents should be asked for their estimate of the value of the property.
- (i) The marketing campaign needs to be at least 4 to 6 weeks and designed to genuinely attract interested buyers. Depending on the nature of the property, this may involve advertising outside the immediate locality.
- (j) One agent should be appointed and directions given as to whether the property is to be sold by auction, tender or private treaty. Auction or tender are the preferred options for mortgagee sales. In Queensland, if the property is a principal place of residence, the property must be auctioned in the first instance.
- (k) The actual form of advertisements must be approved by you before being placed by the agent. This involves making a decision as to whether “mortgagee sale” is included in the form of the advertisement and if so, its prominence. There is no hard and fast rule about this, but our preference is **not** to have “mortgagee sale” included.
- (l) The form of the contract must be drafted before the proposed sale date. We have a standard annexures which go with an standard real estate industry contracts and will prepare this well before it is actually required. The property will be sold on an “as is, where is” basis with no warranties.
- (m) When the sale date comes around, if an auction is proposed, your representative must be at the auction. We prefer that proposed bidders register at the auction with the selling agent and give details of photo ID – as we have had experience with mystery bidder’s acting for the mortgagor being successful at the auction and then being unable to be contacted.
- (n) The property must be presented properly – eg., mown, clean and tidy.
- (o) If the auction or tender price is substantially less than the other valuations, care needs to be taken before signing a contract, as a mortgagee exercising power of sale has a statutory duty to obtain “market price”. This does not require delaying a sale for a market to improve. It means the market price on the day of sale.
- (p) 30 days must expire between the issue of the form 4 and settlement of any sale contract, however, usually, mortgagees wait the 30 days before holding the sale – and this is the preferred option. This means that the agent can be appointed and advertising started before the 30 days expires.

(q) The sale should be to an unrelated party.

9. There is a second way of selling the property and that is for the mortgagee to appoint a receiver to sell the property. This is a popular approach at present, as it ensures that the sale is independent and the risk of selling at an undervalue, is transferred to the receiver. However, all the comments above apply equally to a receiver. The costs of the receivership sale are paid from the sale proceeds.
10. If the mortgagee holds a second (or even later) registered mortgage, then additional consideration needs to be given as to how to deal with the first mortgagee. In practice, dealing with a first mortgagee is a balancing act, because the first mortgagee's rights have priority over the second mortgagee's rights. This means that, for instance, if a first mortgagee becomes aware that a second mortgagee has entered possession or is exercising power of sale, the first mortgagee can notify the second mortgagee that it has either entered possession or is exercising power of sale and in that case, the second mortgagee will become powerless.

What this means in practice is that, so long as the second mortgagee has some confidence that the debt owed to the first mortgagee is considerably less than the value of the property, the second mortgagee should take as many steps as possible in the mortgagee sale process, before approaching the first mortgagee to inform it of the status. Usually a first mortgagee can be convinced to do nothing in the interim, because the second mortgagee can legitimately claim that:

- (a) it has the process under control and is ahead of the first mortgagee in terms of the timing of exercising rights; and
- (b) if anyone is to lose money on a mortgagee sale, it will be the second mortgagee not the first mortgagee.
11. Foreclosure is a remedy open to the holder of a registered mortgage but is a Court ordered remedy only. Foreclosure in Australia is quite different to the American concept. In Queensland, the remedy available to mortgagees under section 99 of the *Property Law Act 1974* but is not commonly used.

Under a Foreclosure, the Court orders that the legal and equitable title to the mortgage property be transferred to the mortgagee and that the secured debt is extinguished.

In practice, an Australian Court will only make a foreclosure order if it is satisfied that the market value of the mortgage property is less than the amount of the secured debt.

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