

23

MORTGAGES UNDER THE REGISTRATION OF
TITLES ACT

By the 17th century, the principles of law and equity as they apply to Mortgages as we know them today had become well established in England. These rules and practices were introduced into Jamaica when the Island was settled by the English in the mid 17th century.

A legal Mortgage of freehold land under the general law system is effected under the general law system is effected in the traditional manner by a deed following settled lines whereby the legal estate is conveyed to the Mortgagee in fee simple or for such lesser estate such as a life estate as the Mortgagor has, subject to a proviso for redemption and the re vesting of the title in the Mortgagor on payment in full of the principal, interest and other moneys intended to be secured.

The deed necessary to give full protection to the Mortgagee in securing repayment of the debt due to him was a long and complex document.

To simplify the task of Conveyancers, a Conveyancing Act was enacted in 1889 which provided for a statutory Mortgage in a simple form to secure the payment of the debt. The use of this form incorporated implied statutory covenants as to repayment of principal and interest and the proviso for re conveyance. Also implied by statute are powers to sell, appoint a receiver and while the Mortgagee is in possession to cut and sell timber not being for shelter or ornament.

Generally, the Act provided the machinery whereby the use of the forms incorporated by statutory implication the remedies and rights available to Mortgagees which previously were recited at length in the deed.

In that same year the Registration of Titles Act was enacted. The preamble to this Act reads "Whereas it is expedient to give certainty to the Title to Estates in Land and facilitate the proof thereof, and also to render dealings with land more simple and less expensive;"

The change made by registration of title in the methods by which land may be made security for money payments is quite as great as are the changes with respect to proof of ownership and the protection of equitable interests.

Registration of Title may be said to have made possible a system of registered charges doing away with the anomalous system of Mortgages under which the Mortgagee is in law the owner of the land when in fact he is

Equitable Mortgages by deposit of the Certificate of Title is impliedly recognized.

There is no statutory authorization of Mortgages by transfer of the registered ownership of the land to the Mortgagee. Such a Mortgage may however be effected by an absolute transfer with a separate deed of defeasance on repayment of the moneys secured.

A statutory form of Mortgage is prescribed which is not under seal and only takes full effect by registration.

When land subject to a Mortgage is brought onto the register, the Mortgagee may exercise the same rights and remedies as if the Mortgage had been made and registered under the Act and the Mortgage may be discharged as provided in the Act (Section 75). Mortgages created prior to initial registration have, when entered on the register, as nearly as possible the same effect as statutory Mortgages.

The prescribed form must be followed in substance though verbal identity is not required.

The frame of the ordinary instrument of Mortgage consists of a statement that the person executing it, being the owner of the land mortgages it to the Mortgagee with the principal sum and interest in favour of the Mortgagee and includes covenants for payment and any permissible stipulation in addition that may be desired.

Covenants to repay principal and interest and to repair (Section 111) are implied by the statute and a short form of covenant for insurance may be adopted (Section 113). A form of mortgage for Building Societies is provided.

Every covenant and power to be implied by the statute may be negatived by express declaration and the form may be varied though not in substance.

As to what is substantial compliance is the difficulty but at least an instrument does not substantially comply with or follow in substance the statutory form unless it is on its face drafted with reference to the provisions of the Registration of Titles Act.

Variations in the statutory form may be by way of either alteration or addition but the Mortgage must purport to operate by way of charge on and not conveyance of the registered title. The charge is an essential feature of

RIGHTS AND LIABILITIES OF THE MORTGAGEE

BENEFIT OF OWNERS COVENANTS

The statute itself implies a covenant to repay principal and interest by being expressly inserted in the prescribed form of Mortgage and by being impliedly contained therein by the Act (Section 111) unless of course an agreement to the contrary is made.

A covenant to repair is also expressly implied by statute and a covenant insure against fire is implied by being expressly inserted in the form and the statute provides for a short form of covenant for insurance (Section 113).

Covenants by the owner in a Mortgage of leasehold lands to pay the rent and observe the covenants reserved and contained in the Lease would, if required, have to be specially introduced in the Mortgage instrument.

POWER TO APPOINT RECEIVER

A statutory right, whenever the Mortgagee is entitled to sell, is conferred to appoint a Receiver of the income of the mortgaged property or any part thereof. The Receiver is deemed the agent of the Mortgagor.

RIGHT TO DISTRAIN

Right is given to distrain for arrears of interest to an amount not exceeding rent due and this includes the owner himself when in occupation.

POWER TO ENTER AND TAKE POSSESSION

Power is given to enter into possession by receiving the rents and profits and also to bring an action for recovery of the land as though the Mortgage had been made by an assurance of the legal estate in the mortgaged land where the Mortgagor is in default.

POWER TO LEASE

Powers are conferred on Mortgagees of land when in possession to make an Agricultural or Occupation Lease for any term not exceeding 21 years or a Building Lease for any term not exceeding 99 years.

POWER TO SELL

The scheme of the Act is that on default being made by the owner and continuing for a period of one month, the Mortgagee may give the owner notice and on the default continuing for a further period of one month the power to sell the land at once arises.

RIGHT TO FORECLOSE

The alternative of ordinary or statutory procedure for foreclosure applies to Mortgages existing at the time of initial registration only.

For the Mortgages effected after initial registration, an action for foreclosure cannot be brought by the Mortgagee and the statutory method must be adopted.

Shortly, the method is as follows:

After six months default by the owner, the Mortgagee having unsuccessfully offered the property for sale, makes formal application to the Registrar for foreclosure and upon the order being issued and registered, the Mortgagee becomes the registered owner of the land. In effect the land is transferred by the owner to the Mortgagee.

Foreclosure in the case of registered land cannot be re-opened as may be done - almost as a matter of course - under the general law.

A Purchaser from a Mortgagee who has foreclosed and become the registered owner of the land is as fully protected as any other proprietor.

RIGHT TO DEAL WITH THE MORTGAGE SECURITY

The Act expressly permits a transfer of the mortgage and the transferee is expressly authorized to sue for the debt in his own name thus rendering any separate assignment of the debt unnecessary.

There is no provision in the Act authorizing a Sub-Mortgage but there is no reason why a Sub-Mortgage may not be created by an absolute transfer duly registered constituting the Sub-Mortgagee the owner of the security and a collateral unregistered instrument giving the Sub-Mortgagor the right of redemption.

This right can be protected by a Caveat on the register and the Sub-Mortgagor will then have a merely equitable interest protected like other equitable interests from unauthorized disposition on the part of the legal owner.

MISCELLANEOUS RIGHTS

There are certain rights enjoyed by a Mortgagee of unregistered land which accrue to him technically as a result of his receiving a conveyance of the Mortgagor's ownership of the land.

There are rights such as the custody of the owners Certificate of Title, restrictions on the ability to sell

MISCELLANEOUS RIGHTS CONT'D.

The consent of the Mortgagee given prior to the registration of the Lease has the same effect as if the Mortgage had been registered after and subject to the Lease.

The first Mortgagee may have paid over to him any moneys recovered by the Mortgagor in any action for waste or damage to mortgaged land in reduction or satisfaction of the moneys secured.

There is no express provision in the Act for future or further advances. However, the rule seems to be that further advances by a Mortgagee cannot ordinarily be made so as to gain priority over subsequent registered Mortgages. But advances under a Mortgage which expressly secures further advances may gain priority, if made without notice of any subsequent Mortgage even though the latter be registered or protected by Caveat.

The difference from the Mortgage by a conveyance of land to the Mortgagee under the general law results in some difference in the rights of a Mortgagor of unregistered land.

The right to deal with the land will most commonly be exercised by transferring to a purchaser or sale, by making Leases and by creating second and other Mortgages.

The transfer to a purchaser will not affect the Mortgagees rights against the land or the original owner under the personal covenants.

Leases will require for their validity the consent of the Mortgagee.

A second or other Mortgage is in the same form as the first Mortgage and can be executed by the owner without the consent or permission of the first Mortgagee though production of the duplicate Certificate of Title will usually be necessary to obtain registration.

The Mortgage may be discharged on production of a memorandum signed by the Mortgagee and attested.

It is well established that equitable interests in registered land may be created and that these will as between the parties be governed by the same principles as equitable interests in unregistered land.

The general principle on which the recognition and effect of equitable Mortgages rests is that the owners duplicate Certificate of Title - the document in his possession - is similar in value and legal effect to title deeds of unregistered land.

Properly speaking, this Certificate is not a muniment of title at all.

The owners Title to his land rests ultimately on the register which is kept in official custody at the Titles Registry.

are to be made on the register.

The limited nature of its munimentary character is shown by the provisions of the Act for registering without its production and for replacing it.

The Act makes no provision for a security by deposit but the validity of such a security is implied by Section 81 (3) which provides that before production can be dispensed with, and registration effected, formal evidence must be furnished that the ^{duplicate} Certificate has not been deposited or held as security or otherwise and whether it is subject to any lien.

The validity of equitable Mortgages by deposit of Certificates of Title has been amply established. It seems that the Certificate of Title though not strictly a muniment of Title is yet such a document of Title relating to the land that is to be treated as an actual Title deed for the purpose of implying an agreement to charge the land in favour of the depositee, the charge conferring the same remedies as a deposit of ordinary title deeds.

The principal features of the security by deposit is that they are purely equitable and though impliedly authorized are not registrable so as to become legal interests and therefore have no warranty of title accorded to them.

They can be protected by Caveats.

The proper remedy of the equitable Mortgage by deposit of Certificate of Title is foreclosure effected by an order of the Court for the land to be transferred by the Debtor to the Creditor and if a Transfer cannot be had a Vesting Order may be made.

The statutory procedure for realising a security has no application to an equitable Mortgage.