

## Property

# Repossession rising

**Tom Poole** examines the wide-ranging implications of *Horsham Properties*

### IN BRIEF

- *Horsham Properties Group Ltd v Clark & Others*: the exercise of a statutory power of sale under LPA 1925, s 101 after a relevant default by the mortgagor is not a deprivation of possessions.

The number of properties repossessed by mortgagees in the UK rose by 48% in 2008. According to statistics issued by the Ministry of Justice (MoJ), there were 28,658 mortgage possession orders made in the second quarter of 2008, 24% higher than in the second quarter of 2007. Against this stark backdrop came the decision in October 2008 in *Horsham Properties Group Ltd v Clark & Others* [2008] EWHC 2327 (Ch) [2008] All ER (D) 58 (Oct).

### Horsham Properties

The facts of the case are straightforward. Paul Clark and Carol Beech (the defendants) owned a house in Chatham, Kent (the property). In 2004, they entered into a mortgage with GMAC (the mortgagee). The defendants fell into arrears with their mortgage payments and in April 2006 GMAC appointed receivers over the property. In September 2006, the receivers sold the property at auction. The purchaser was Coastal Estates Ltd (Coastal). The property was transferred by the receivers as agents for GMAC and on the same day Coastal transferred the property to Horsham Properties Group Ltd (Horsham) who then brought a claim for possession of the property claiming that the defendants were trespassers.

The possession claim was defended on the basis that s 101 of the Law of Property Act 1925 (LPA 1925), infringed the Convention rights of mortgagors by permitting mortgagees to overreach the mortgagor's rights in relation to mortgaged property by selling it out of court, without first obtaining a court order for possession, or an order for

sale. Prior to the coming into force of the Human Rights Act 1998 (HRA 1998), the defendants would have had no defence to Horsham's claim for possession, as the pre-HRA 1998 understanding of the relationship between LPA 1925, s 101 and s 36 of the Administration of Justice Act 1970 (AJA 1970) was clearly explained by the Court of Appeal in *Ropaigealach v Barclays Bank* [2000] 1 QB 263. In short, LPA 1925, s 101 enables a mortgagee to sell without seeking a court order permitting him to do so.

### Defence

The essence of the defence advanced against Horsham was that the traditional understanding, as set out in *Ropaigealach*, could only be compatible with the Convention rights of residential mortgagors if LPA 1925, s 101 was

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construed as requiring a mortgagee first to obtain a court order for possession or to make an application for an order permitting sale, or if AJA 1970, s 36 was construed so as to confer upon the court the discretionary powers to adjourn or suspend the making of a possession order. Alternatively, the defendants sought a declaration of incompatibility in relation to s101, which lead to the intervention of the secretary of state for justice.

Mr Justice Briggs had no difficulty in concluding that the defendants' share in the equity of redemption in relation to the property was a “possession” within the

meaning of Art 1 of the First Protocol to the Convention (A1FP). However, he held that the defendants' equity of redemption was lost by virtue of the exercise of powers conferred purely by contract. Recognising that a different result might have ensued had GMAC sold the property purely in exercise of its statutory powers under LPA 1925, s 101 Briggs J went further and held that even in such a case there would have been no deprivation of possessions within the meaning of A1FP. The reason being that s 101 serves to implement rather than override the private bargain between mortgagor and mortgagee. It is a form of conveyancing shorthand, and its effect is not only apparent on the face of s 101, but (in the present case) spelt out in terms in the mortgage itself.

### Early fall

In the circumstances, the defendants' case fell at the first hurdle, with the court finding that the exercise of a statutory power of sale under s 101 after a relevant default by the mortgagor is not a deprivation of possessions within the meaning of A1FP. The decision in *Horsham* reaffirms the power of mortgagees to sell property when mortgage money becomes due within the meaning of LPA 1925, s 101 without first seeking a court order. The power is hardly ever used by mainstream

mortgage lenders, as generally it makes very little business sense. The concern is that rogue lenders will threaten the use of the power, which is why the MoJ is investigating whether further action needs to be taken to protect homeowners.

Whether LPA 1925, s 101 is amended in light of *Horsham* waits to be seen. Until such time practitioners advising both mortgagees and mortgagors need to be aware that the pre-HRA 1998 understanding of the relationship between LPA 1925, s 101 and AJA 1970, s 36 remains unchanged. NLJ

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