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Issued July 2008

LOVEGROVE & LORD
Commercial & Construction Lawyers
ABN 35 348 332 938

Kim Lovegrove
Managing Partner
Lovegrove & Lord

Author of numerous books on building law, head of construction law division, key legal advisor on the Victorian Building Act, past president Australian Institute of

Finsia Address – Damage Control and the Commercial Imperative In the Property Sector

Paper by Kim Lovegrove, Managing Partner, Lovegrove and Lord Lawyers, Breakfast Forum, July 10 2008

Introduction

The cost of money is soaring, inflation is up and labour and in particular material costs are escalating and by all accounts, there is a decline in building approvals. We are entering into a new property paradigm. It is somewhat unprecedented in that even though property prices are higher and construction costs are escalating, there is an emerging shortage of property and rents are skyrocketing. This seems to be due to the strong migration figures into Victoria, in particular the city.

However, the situation is not akin to the early '90s' property meltdown in that the last recession was accompanied by a surplus in new property and much higher vacancy rates so we are possibly venturing into unchartered waters

In the building industry, the juxtaposition of higher borrowing costs, break-out prices on materials, in particular steel is indeed unfortunate. This is particularly the case with builders and sub-contractors who invariably enter into fixed price contracts which means that their profit margin will be threatened if there is significant inflation in the construction labour and material dynamic.

You may say "Well what has this got to do with the developer? If the developer has entered into a fixed price and the builders price is overrun, then too bad. That is the builder's lookout." This is all very well but if a building contractor or a sub-contractor cannot build for the quoted price then that can put the project at risk. If the builder "goes under" the developer is then faced with real haemorrhage. Or to put it another way, there is a palpable risk of developer insolvency.

In the late '90s' our firm acted for a major insurance company. The insurer provided indemnification for insolvency of builders. When the builder went "belly-up", the insurance policy enabled the property owner to claim indemnity under the insurance policy. Hence whatever the increase completion costs were, they found their way to the insurers.

When projects "go under", mortgagees in possession haemorrhage.

We had conduct of a number of multi-million dollar multi-unit development insolvencies. The completion costs on average blew out by a factor of anywhere between 40 and 80 percent. Reason being when a builder goes "hits the wall" quite often an entirely new contracting team needs to be engaged. If a builder "goes under" on one job there is every chance that the builder will go under on all of its jobs. In one matter that I was involved with, the builder "went under" on three multi-unit developments and the completion costs blew out by many millions of dollars.

The current residential insurance policies do not enable a developer to claim indemnity for the totality of increased completion costs, rather there is a 20 percent limitation. The limitation was introduced because roundabout 1999 the insurers who

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underwrote warranty and indemnity organised and "lobbying posse", of which I was a member, to approach the government with a view to asking the government to amend the insurance gazettes to impose a heavily reduced cap on incompletion cost blow-out indemnity. The insurers in "common song" impressed upon the government that the cost of providing indemnity for blanket incompletion cost blow-outs was unsustainable from an under writing point of view. The government acceded to this imperative, because failure to do so could have placed the mandatory warranty scheme in jeopardy.

The insurers also persuaded the government to exclude developers from the claimant category. The net effect being that developers can no longer claim indemnity from insurers in the event that a builder becomes an insolvent. Successors in title can however. Whether a lender as mortgagee in possession could claim indemnity is an interesting and moot point.

Nevertheless, when you consider that insolvency indemnity as a successor in title for the likes of multi-unit developments was considered to be an uninsurable risk for the insurance fraternity, the audience will have some appreciation of the gigantic losses that are associated with this type of insolvency.

It is also worth noting that when multi-unit development exceeds three storeys, with adobes in each storey, there is no legislative requirement for builders to effect warranty insurance. Further, developers are excluded from the class of potential claimers.

Where there is builder insolvency, there is every chance the contagion will spread to the developer. Why? Because the developer will bear the brunt of the increased completion costs and if the developer is unable to resource alternative funding then the lender will be at risk of inheriting a partially completed project nightmare.

So how can the lender fortify its position in an economic paradigm?

The use of the tripartite agreement

Very effective tripartite agreements need to be in place. Many if not most tripartite agreements that we have seen sadly are severely wanting. And yes, they are agreements that we have seen generated by the banks. Miro will give you examples of where they are wanting.

Of course it is critical that the lender can step into the shoes of the developer if the developer "goes under", but likewise "thinking outside the circle" it could at times be useful if the lender could also step into the shoes of the builder, through an intermediary if there is a dual insolvency, because remember when a project "goes under", the dominoes topple right down the line.

Any agreement engineered should also give the lender the ability to vet and approve of the head contract. Rarely does a tripartite agreement "marry up" with the head contract that operates between the builder and the developer. When this does not occur there is no "contractual marriage", no contractual harmonisation and invariably the builder will ignore the tripartite agreement and instead pay exclusive homage to the head contract.

Frankly, the lender should control the head contractor and tripartite packaging, have a contractual suite on board and have a condition of finance that both the developer and the builder have to use the package of the lender's nomination.

Our law firm has a tremendous amount of experience in the harmonisation of such agreements. We have frequently been asked from property operatives in banks to put a proposal to their banks to overhaul and harmonise their agreements. But invariably the "gatekeepers" prevent us from "getting the gig" because typically banking policy requires the banks to use panel lawyers of first and second tier law firm persuasion rather than boutique/ expert firms such as Lovegrove and Lord.

Taking a different approach to risk

When the paradigm changes the method of contract should often change. Everybody loves a fixed price contract where there is no rise and fall or cost adjustment indices. Why? Because there is price certainty. The problem with this however is that in a high inflationary environment the contractors under fixed price can be expected to bear too much of the risk, if not unrealistic level of risk. A major project from augmentation to conclusion may take two to three years.

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The CPI over the last twelve months was 4.4 percent, in construction I surmise that it may have been much higher. If a labour and material blow out during this period is unusually high it could eradicate the builder's profit and therefore put the project in jeopardy.

I am not in a club of one with respect to the harbouring of these sentiments. Tuesday's Financial Review under the banner heading "Construction companies fear impact of soaring steel" in a column by Matthew Dunkley stated, and I quote, "*rocketing steel prices could bankrupt construction companies unless a greater flexibility is built into contracts, Master Builders Australia has warned…* Brian Seidler, executive director of MBA New South Wales in the same article said infostructure projects could have long lead times and there could be massive fluctuations in the price of key materials such as steel and concrete between the time of tender and the actual start of work.

Mr. Seidler added that price of reinforced steel over the last six months had risen by about 60 percent. He also opined that "*unless there is some flexibility in contracts to allow contractors to cope with the unpredictable building materials costs companies will struggle to survive, and competition in the building sector will take a blow*"

In this changing paradigm consideration should be given to permitting contractors and sub-contractors "down the line" to claim "rise and fall" or cost adjustment based on a formula that is commensurate with the labour and material index pertaining to the construction industry. Reason being if the project goes "off the rails" because of high inflationary impacts and the lender inherits a "black hole" or 50 percent completed project the cost to complete will be horrific and will be compounded by higher than normal inflation. Note however that in the case of residential or multi-unit development rise and fall provisions are illegal as they contravene the domestic building contracts act.

It is probably open however to incorporate "inflation vulnerable" components of constructions like steel as prime costs or provisional sums.

In light of the above, be very circumspect about the financing of contracts where the developer boasts to you that it is "screwed down" the builder on price and has landed the builder with all of the risk. Draconian conditions and a lack of fair and equitable risk sharing could prove to be a diabolical formula in a high inflationary environment. It is not a time to be "too smart by halves".

When "things hit the fan"

So what does a lender do when the developer goes under? Having been in the construction industry for more than 20 years, we have been round long enough to remember the early '90s' recession. There was absolute carnage in the building industry, "holes in the ground", union black bans, defunct developments and so forth.

In those days the saying "the first loss is the best loss" had currency. Yet there were "counter thinkers" like Donald Trump who, at a time of serious vulnerability cajoled the banks into working with him, to work through the malaise and he effectively became the turnaround king.

In the early '90s' be it through working with administrators or negotiating with trade unions I gained insights that have been shelved for the better part of two decades. But they will nevertheless be equally apposite in a stressed property paradigm.

It is important for a lender in possession to be able to negotiate with key contractors on the building site. Where one has the juxtaposition of developer and builder insolvency, which is not unusual invariably the sub-contractors have been short-changed because monies that should have found their way to the contracting fraternity for whatever reason failed to arrive.

If the bank looks at project resuscitation through administrators and so forth it is axiomatic accord needs to be engineered with the contracting fraternity. This sometimes involves negotiating payments to the contractors directly or more astutely through another medium. If the contractor workforce can remain intact disruption can be minimised along with consequential costs.

Builders charged with the responsibility of completing an insolvency project rarely go for fixed price. Reason being when they pick up a half built project it is very difficult to accurately cost the completion price so they often insist upon project management.

One of the imponderables is how much of the original sub-contracting team can be retained. Obviously sub-

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contractors with knowledge of and intimacy with the project auger well for cost containment.

If the lenders through their administrators choose to complete the project cost plus project management may be the only workable solution. If however this is the election, it is paramount that the lender through it's various intermediaries have highly experience quantity surveyors or cost controllers that can verify the authenticity of project expenditure.

In terms of dealing with unions, some of the strong arm site "blackballing" techniques of the late '80s'/early '90s' may not be in vogue because of the potency of the Australian Building Construction Commission. If there were to be any union intervention of an intermediary persuasion resort could be had to the ABIC.

The critical thing is to have access to the right team of advisors when confronted with project meltdown. Preferably there will be some old seasoned campaigners with corporate memory of the early '90s'. A myopic, anally retentive approach to commercial damage control could prove very costly.

Is the first loss the best loss?

The old adage "the first loss is the best loss" whereby one offloads a project at a heavily discounted price may not be the most cost effective solution. It may be better to work it through, to deploy a SWAT team to complete the project with a view to offloading the as-built product.

For fear of labouring the point the ability to put a SWAT team together comprising seasoned hands cannot be underestimated and it is very import that the lender is plugged into these networks.

Haydn Park of Finsia made mention to me that one of the reasons for the large attendance at today's breakfast seminar is that some attendees have opined that they have no experience in this type of paradigm, hence this presentation and our thoughts on point, because Andrew Lord, Miro Djuric and myself have trodden this path by virtue of our intimate connection with the building industry in this state.

Conclusion

A change of the property dynamic requires a change in approach on the part of all key players in the building sector, be they bankers, developers or builders.

The ridiculous level of risk that has been borne by builders under their contracts of engagement, or should I say instruments of incarceration, may be sustainable in low inflationary boom times, but not so in an environment where the likes of steel and contracts are going through the roof. Risk sharing has to become far more equitable and realistic and the lender should be exceedingly vigilant in ensuring that the developer makes such allowance. To reiterate, if the builder becomes insolvent because of volatile material price escalations, the developer will take a bath and the lender a "drenching".

The "off the shelf" contracts from various precedent banks downtown designed to regulate the contracting affairs of developers and builders, in many key areas could well be redundant, in this market, so there is every chance that there needs to be a widespread change in risk burden philosophy and dispensing with prejudicial terms of contract.

Finally, if the lender is burdened with the mantle of mortgagee in possession it needs to engage in serious cost benefit analysis complimented by an open mind, and intelligent and unemotional approach to commercial solution. And within that configuration, the lender must have access to the best types of advisors possible, be they legal, be they number crunchers, be they seasoned campaigners who have already trodden this path.

For more information, please contact Kim Lovegrove
Phone: (03) 9600 3522 | Fax: (03) 9600 3544 | Email: kiml@llcc.com.au

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Legal Bulletin

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Commercial & Construction Lawyers
ABN 35 348 332 938

Miro Djuric
Special Counsel and Chief Operating Officer
Lovegrove & Lord

Senior construction lawyer, front end expert, building regulatory expert, previous lawyer on retainer with Master Builders Association.

Finsia Address – Risk for Bankers and Building Contracting

Paper presented by Miro Djuric, Special Counsel and Chief Operating Officer, Lovegrove and Lord Lawyers, Breakfast Forum, July 10 2008. Written by Kim Lovegrove and Miro Djuric

The construction industry is fraught with risks for the uninitiated. The government has had to legislate to protect owners from the vagaries of building contracting through vehicles like the Domestic Building Contracts Act. Security for payment legislation has been implemented to protect the payment rights of sub contractors. Unions from time to time enter into the foray and use unorthodox measures to exact payment from builders, developers and the like.

There is no Act of parliament that protects banks from defaulting parties. The remedies reside in

- Legal instruments
- Due diligence
- Being savvy and understanding the vagaries of the building industry.

This paper will deal with some of the main ways by which bankers and financiers alleviate risk. It will also identify what the writer has identified as being a flawed approach in the way some of the security instruments are used and developed. One of the main focuses will be upon the use of tripartite agreements.

The Tripartite agreement

Many funders use tripartite agreements to avail themselves of the ability to, in a de facto sense, control the activities of contractors and customers or developers. Unless a higher degree of science is applied to the way in which these deals are put together there can be seriously negative and unintended consequences for the funder.

Tripartite deeds typically give the funder the ability to veto variations, contractual termination or contractual suspension; yet these deeds in the main stipulate that these veto powers exist without there being any possibility of liability to the funders, this is naive. Third party intervention generates legal and logistical consequences and it impacts upon the way by which builders and developers operate under their head contracts.

Tender Considerations

If the funder is intent on a builder coming within the jurisdiction of a tripartite agreement the funder should make sure that the tender documents contain a document that requires the builder to enter into a tripartite deed. If this does not exist the funder will have no ability to compel the builder to execute a tripartite agreement.

Harmonisation amendments

The funder should get a construction lawyer to check the head contract i.e. the contract that the builder enters into with the developer to ensure that relevant provisions of the tripartite deed are harmonised with the key provisions of the building contract.

If that is not contained the deed must contain an overrider condition. An overrider clause is one that states that where a conflict between two clauses then one of them will take

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precedence.

However if there is a residential building contract it will be governed by the Domestic Building Contracts Act. This Act regulates construction contracts in the building industry. If the deed contains a provision that cuts across or is at odds with a provision of a legislatively compliant housing contract or multi unit development contract then the provision in the deed will be read down or will be null and void.

Considerations to do with Contractual Suspension

A typical provision in a tripartite agreement dictates that the builder cannot suspend the building work without the permission of the financier or until the expiration of a certain number of days.

One such provision came across our desk a fortnight ago, see below

In the case of the fault by the customer, the builder may not suspend the works unless within 21 days from the receipt of the notice… the financier does…

Neither the customer nor the builder may suspend the works as a result of any fault by the other unless the financier has been first notified of the breach containing reasonable defaults.

Compare this with a suspension clause in a building contract will often read along the following lines:-

If the owner delays payment by more than 10 days, then the builder can suspend the works pending payment of outstanding progress payments.

The problem with the deed provision is that it will be at odds with the suspension provision in a standard industry building contract. Such provisions do not contemplate any third party intervention right, hence the provisions cut across one another.

The Impact of the Building and Construction Industry Security of Payment Act 2002 (SPA)

Large scale developments usually have sophisticated inspection and claim assessment procedures. The bank will appoint an independent QS, whom once armed with a progress claim will inspect the work and recommend payment in full or in part.

Under the SPA when a progress claim is lodged by the contractor, the developer needs to then provide a payment schedule either within the time required by the building contract or within 10 business days after the date upon which claim is served, whichever period of time expires earlier.

If the developer fails to deliver the payment schedule by the due date, then the developer becomes liable to pay the claimed amount to the builder by the due date (under the contract) for the progress payment to which the payment claim relates.

If the developer fails to pay by the due date, then the amount claimed becomes a debt due and may be recovered in court. The builder is then entitled to suspend the work upon two days notice. The entitlement to suspend the work under these circumstances does not constitute a breach by the builder of the Building Contract.

Termination clauses

A typical tripartite condition will provide that neither the builder nor the developer can terminate a contract unless the prior permission of the financier is forthcoming. The below provision is typical case on point

The builder cannot terminate or rescind the building contract as a result of any breach of the building contract by the other party unless

- *The builder has given notice to the financier giving details of the breach*
- *In the case of default by the customer, within 21 days of receipt of the notice in sub clause… the financier does not………………… and [so forth]*

Standard industry building contracts have comprehensive termination clauses. They ordinarily provide a “menu” of defaults. They also ordinarily provide that in the event of one of the prescribed defaults a notice of default has to be

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dispatched to the offending party stating the nature of the default. There will be a period of time afforded under the notice, to remedy the default and if the default is not remedied the contract will ordinarily provide that the contract can be terminated by dispatching a notice of termination.

There is unlikely to be any standard industry building contract that either contemplates or stipulates the involvement of the financier in termination. As the above italised provision is a standard tripartite clause it follows that it either has to be deleted or the head contract has to be amended to make mention of the juxtaposition or the involvement of the financier.

The freedom to terminate a contract goes to the very core of contracting just like a financier would not like a third party to inhibit or corral its ability to terminate the contract of a defaulting borrower, the builder will be loathe to afford weight to such a provision when push comes to shove. The builder will want to reach for the contractual arsenal and utilise it. The builder will not be terribly worried about occasioning a breach under the tripartite agreement because his primary relief lies with the developer, the pragmatics of survival will prevail and the conflicting provision under the deed will probably be rendered benign.

Furthermore the overwhelming majority of terminations or suspensions that are generated by builders are on account of non payment. Regardless of the reasons for a financier withholding payment under the head contract, if the builder has done the work and the developer owes the money, the developer will have to pay the money under the head contract.

If the developer invokes a provision unde the tripartite agreement, the net effect of which is to delay payment, the financier could force the developer into a repudiation of contract. In such circumstances the developer regardless of any disclaimer under the tripartite agreement may contend that the funder in so far as it hampered or interfered with head contractor rights, occasioned a serious and fundamental head contractor breach and in so doing breached an implied term of the loan facility.

Novation

Typically a tripartite agreement will allow the financier to step into the shoes of the developer if certain calamities occur. This is a minefield and should be approached with considerable trepidation. When developments "go off the rails" one will generally find that there has been short changing of payments or payment defaults.

If the financier through the novation becomes the new contracting party then it will have to make good payment defaults that have been occasioned by the developer. The short fall could be monumental, Lovegrove & Lord have had conduct of cases where completion costs on multi million dollar projects have blown out by as much as 100%. If the novation is exercised then the developer may unwittingly assume that liability. It may have been better to liquidate the asset and through an administrator on sell the site to another party.

Amusingly, tripartite agreements often have blanket denial of liability clauses the import of which is that the funder cannot be held liable for anything. These blanket provisions are in reality "red herrings", if a novation is exercised the financier will become completely liable to the builder because the financier "steps into the shoes" of the developer and the contractual obligations cut both ways.

Variation Clauses

Typically tripartite clauses provide that variations cannot be augmented unless there is financier sanction, again standard industry building contracts do not afford such third party involvement any status. Harmonisation amendments are therefore required so that the head contract provides that in addition to all of the other criteria that are required to generate a variation the consent of the financier is required.

The Office of the Australian Building Industry Construction Commissioner ("ABCC")

When the financier becomes the new contracting party it assumes a responsibility to remind the principal contractor of its obligations to ensure compliance with laws and guidelines with resect to the building sites under the financier's control.

The ABCC was established on 1 October 2005. It has absorbed the Building Industry Taskforce which operated from 1 October 2002. The ABCC is provided with powers to

enforce laws and to address problems that the building and construction industry encounters.

The ABCC has powers under the *Building Constructions Industry Improvement Act 2005 (BCII Act)*, *the Workplace Relations Act 1996* and the *Independent Contractors Act 2006* to investigate and to take legal action if necessary.

Where the ABCC suspects that breaches have occurred it can take legal action against those responsible. Some of the offences under the BCII Act include:

- Coercion of employers in relation to the engagement and allocation of responsibilities to contractors or employees;
- Coercion or undue pressure on a person to make, vary, or terminate a building agreement;
- Discrimination against an employer in relation to the type of industrial agreement they have;

The BCII Act also makes unlawful certain types of industrial actions. These industrial actions will incur a maximum penalty of up to $22,000 for individuals and up to $100,000 for a body corporate. Some of the types of unlawful industrial actions are as follows:

- A secondary boycott;
- Action taken for a purpose of furthering industrial objectives or disrupting work, imposing bans or restrictions on work practices that conflict with those set out by an industrial instrument, a law or court/body of the Commonwealth or a State;
- Action that is not protected under the Workplace Act 1996.

If the financier becomes aware of a breach of industrial relations law or unlawful behaviour on the building site under its control it should contact the ABCC as soon as possible.

Conclusion

It is clear that many tripartite agreements in circulation are Proforma templates that are designed to operate in a vacuum. If you take a standard industry building contract and a "garden variety" tripartite agreement straight of the word processor, on the overwhelming balance of probabilities the two instruments will work against each other rather than complement one another. This is dangerous, it is dangerous because in so far as the instruments lack homogenization they will as a matter of course lead to a legal minefield. The combined effect of a lack of harmonisation will be the escalation of a dispute and the potential prejudicing of the security that the tripartite agreement is designed to achieve rather than the enhancement of it.

For more information, please contact Kim Lovegrove or Miro Djuric
Phone: (03) 9600 3522 | Fax: (03) 9600 3544 | Email: kiml@llcc.com.au
mirod@llcc.com.au

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Commercial & Construction Lawyers
ABN 35 348 332 938

Andrew Lord
Partner
Lovegrove & Lord

Head of commercial and property law division, corporate governance expert, author of numerous property law publications, chairman of SDP Technology Ltd.

Finsia Address – Lenders Obligations

Paper by Andrew Lord, Partner, Lovegrove and Lord Lawyers, Breakfast Forum, July 10 2008

LENDERS OBLIGATIONS TO A BOROWER ON EXERCISING THE POWER OF SALE

Introduction

With the tightening of credit markets and a general downturn in the economy there is no doubt that increasingly lenders will need to enforce their security.

This raises the inevitable question of what obligations does a lender have to a borrower when it is realising security.

What can a complaining borrower do to stop a mortgagees sale or claim compensation if it believes the sale has not been properly conducted.

The issue that I will be addressing is what obligation if any, does a lender have to the borrower when enforcing their security. Or to put it another way, can the lenders simply sell the property for a price that recovers the lenders debt.

In this presentation I will be examining the obligations of a lender under:

Section 77 of the Transfer of Land Act 1958

Section 420A of the Corporations Act 2001

Right to sell

The right of the lender to sell is covered not only in the mortgage documentation or deed of charge but also under Section 77 of Transfer of Land Act in the case of mortgage enforcement and Section 420A in the case of appointment of receivers and managers under a deed of charge.

For a right of sale to arise whether under a mortgage or deed of charge the following preliminary matters must have occurred.

- The borrower must have defaulted;
- A notice of default will have been issued;
- The notice of default will not have been complied with;
- The right of sale will have arisen.

In the case of land, your mortgage documentation will undoubtedly detail a process or sale however the Transfer of Land Act all imposes a duty on the lender to the borrower.

The critical part of Section 77 in dealing with the duty imposed is that in exercising the power of sale a mortgagee must act in good faith and with regard to the interests of the mortgagor.

The words to focus on are:

> *"acts in good faith and with regard to the interests of the mortgagor"*

What do these words mean?

There have been many cases where a mortgagor has bought proceedings against a mortgagee complaining that the mortgagee did not act properly and get the best price

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obtainable or in other words the mortgagee did not act in *good faith and with regard to the interests of the mortgagor.*

It is clear that the mortgagee has a duty to the mortgagor however what is not clear is the extent of that duty is not clear. In my view given the increased obligations of accountability, transparency and consumer protection it is reasonable to say that this obligation is a growing obligation. In my view mortgagees will be increasingly accountable for their actions in realising their security.

Concepts such as *"good faith"* and *"unfairly dealing with the mortgagor "* are vague. It is difficult to be definitive as to what steps must be taken particularly as these things are always viewed in hindsight. However from the cases which have been decided we are able to conclude a couple of guiding principles.

A mortgagee must take reasonable steps to obtain a fair price. This will involve appointing an agent with the requisite experience and local knowledge to conduct the sale.

A carefully considered marketing campaign must be conducted to ensure it reaches the likely target market.

A mortgagee must exercise the power of sale in good faith and without any intention of dealing unfairly with the mortgagor.

The position with a receiver appointed under a charge is not the same as for a mortgagee. On the face of it the obligations imposed on a receiver are more extensive and onerous. In my view further guidance of the standard imposed on mortgagees can be gained from the obligations imposed on receivers and managers.

The relevant legislation dealing with the receivers obligation to the borrower are found Section 420A of the Corporations Act 2001 which states:

> *In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:*
>
> *(a) If, when it is sold, it has a 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.*

With the Section 77 the standard was

> *"acts in good faith and with regard to the interests of the mortgagor"*

The reason for this distinction is probably to deter a receiver from selling property at a price less than the best obtainable simply because the sale price is sufficient to cover the debt.

Most commentators have sought to draw a distinction between the obligations under Section 77 and 420A.

Most commentators believe that Section 77 on the face of it provides a more subjective test of what the mortgagor did namely, did it act in good faith and with regard to the interests of the mortgagor and that Section 420A imposes a more objective standard "market price" or "best price that is reasonably obtainable".

We could consider extensively the differences between the wording of these two sections but in my view given the increasing scrutiny to which mortgagee's are exposed a more cautious approach is to assume the arguably higher standard imposed under Section 420A when looking at the actions of a mortgagee.

So what are the receivers obligations. Professor Ford enunciated a good summary of the receiver's obligations in his leading text on the Corporations Law he states.

- Identify the appropriate market in which the property should be sold (a sale of cattle on the basis of a value in a market concerned with their weight in meat may fetch less than sale in a market for breeding cattle).
- Ascertain the value of the property on which the offering price or reserve price at auction can be based.
- Consider adequately whether there is any probability that more would be gained by selling a plurality of items together or by selling them separately.
- Engage competent selling agents where necessary.
- Plan a sale designed to test the market by public auction

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where an auction sale would be usual for the type of property in question.

- See that the sale is properly advertised with full information about the features of the property likely to attract buyers.

- Allow adequate time for the advertisement to have effect;

- Refrain from telling possible buyers a reserve price at auction and details of the amount due to the charge holder.

For more information, please contact Kim Lovegrove or Miro Djuric
Phone: (03) 9600 3522 | Fax: (03) 9600 3544 | Email: andrewl@llcc.com.au

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