
Mortgagees' Power of Sale and the Duty to Sell at Market Value

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Abstract

In times of an economic downturn and financial hardship, many homeowners face the risk of having their homes repossessed and sold. When mortgagors are unable to pay their mortgage loan and they default on their payments, the mortgagee, such as a bank, building society or other financial institution that provides mortgage loans, has a right to exercise a power of sale, providing certain requirements are met. In such circumstances the mortgagee generally acts in his or her own interest and does not represent the interests of the mortgagor. However, over many decades the courts have held that the mortgagee does have a duty to act in good faith when exercising a power of sale. A question that does, however, arise is whether or not a mortgagee has a duty to sell the mortgaged property at market value and at a favourable time to get the best possible price. The aim of this article is to consider the mortgagee's duty to the mortgagor when exercising a power of sale with specific reference to the duty to act in good faith, selling at market value and the timing of the sale. The article concludes with some guidelines that particularly pertain to financial institutions and property valuers.

Introduction

The impact of the recent economic crisis has been felt by people in many different ways, not least of which is the devastating consequence it has had for many homeowners who have faced the prospect of losing their home because they could not pay their mortgage. In July 2009 the media reported that 'WA house repossessions hit [a] record high' with 1336 houses taken back by mortgagees in 2008/2009.¹ The report follows a statement by the Western Australian Council of Social Services (WACOSS) that the number of homes repossessed in the last financial year was 'almost double' the numbers of the previous year, and 'four times [the number] in 2006-2007'. The Chief Executive Officer of WACOSS commented that 'repossessions were likely to be "the tip of the iceberg" for mortgage

stress in WA'.² Concomitantly, mortgagees have found themselves in the invidious position of having to exercise their power of sale where mortgagors have not made their loan repayments and have been in default for a period of time. Inevitably when this happens there is tension between the rights and interests of mortgagors and mortgagees, with mortgagors needing to get the best possible price for their home and mortgagees simply wanting to settle the debt as quickly as possible. It is natural for mortgagors to place a greater value on their property both for financial and emotional reasons. This tension is reflected in the following passage from the Australian film 'The Castle'³ (1997) cited by Judge Vickery in the recent case of *Nolan and MBF*

¹ Chalpat Sonti, 'WA House Repossessions Hit Record High', *WAtoday online*, 1 July 2009 <<http://www.watoday.com.au/wa-news/wa-house-repossessions-hit-record-high-20090630-d3p8.html>> at 31 July 2009; Cortlan Bennett, 'Record Number of WA Homes Repossessed', *perthnow*, 1 July 2009 <<http://www.news.com.au/perthnow/story/0,21598,25718221-5013244,00.html>> at 4 September 2009.

² *Ibid.*

³ 'The Castle' (1997), an iconic Australian film, tells the story of a family who face losing their home when developers attempt to acquire the property in order to expand the Melbourne Airport. The main character tries to protect his home and he resists all efforts to evict him. A lawyer offers to take the case to the High Court of Australia and successfully argues that the family has the right to compensation for the acquisition of the property under Section 51(xxxi) of the Australian Constitution.

Investments,⁴ in which the central character Darryl Kerrigan passionately implores:

They don't get it. They're judging the place by what it looks like, and if it doesn't have a pool, or a classy front, or a big garden. And because of that it's not worth saving. But it's not a house, it's a home. It's got everything. People who love each other, care for each other. It's got memories, great memories! It's a place for the family to turn to, come back to.

In the *Nolan* case, the Court found that the mortgagee had completely disregarded Mr Nolan's interest in the property and that there was no need for the defendant to have sold the property for the purpose of obtaining payment of its mortgage debt. The Court held that:

...its [the mortgagee's] conduct of the auction sale on 18 August 2001 was undertaken deliberately and with full knowledge of the relevant facts, including the impact its decision would have on Mr Nolan and his family. In exercising its power of sale in the way it did, MBF carried into effect the indirect object of destroying Mr Nolan's legal interest in the land by depriving him of full ownership of the property by the exercise of his right of redemption. MBF's decision also had the effect of evicting Mr Nolan and his family from occupation of the land and the dwelling house situated on the land.⁵

The basic question that generally arises in such situations is: what is the duty of the mortgagee when exercising a power of sale? This article will address this question with specific regard to the following three key issues: the duty to act in good faith, selling at market value (with particular reference to the recent proposed amendments to the *Property Law Act 1969* in Western Australia), and the timing of the sale. The article concludes with a few practical guidelines for financial institutions dealing with mortgagors.

⁴ *Nolan and MBF Investments* [2009] VSC 244, in which the plaintiff claimed that the defendant breached its duties by failing to act in good faith, ignoring the plaintiff's interest when conducting the sale, and that the conduct resulted in a fraud on the power of sale.

⁵ *Ibid* 282.

Mortgagees' duty when exercising a power of sale

When a mortgagor has not paid the mortgage loan for a certain period of time, the mortgagee may proceed to take possession of and sell the property to satisfy the debt, provided certain requirements are met. According to Hilton and Barbaro 'a mortgagee exercising a power of sale is the enforcement mechanism most commonly relied on by mortgagees' when a mortgagor is in default and 'it is also the most litigated aspect of the mortgagor and mortgagee relationship'.⁶ The right of a mortgagee to exercise a power of sale is usually provided for in the mortgage contract document or it may be conferred by legislation. In Western Australia, for instance, s 57 of the *Property Law Act 1969* (WA) confers a statutory power of sale. Similar provisions are found in property law legislation in other jurisdictions.⁷ Mortgagees under the Torrens system⁸ may also exercise a power of sale in terms of Torrens legislation.⁹ Before a mortgagee can exercise a power of sale, the mortgagor must be issued with a default notice.¹⁰ The default notice must also generally meet certain requirements. For instance, the default notice must be clear, accurate and unambiguous so that the defaulting mortgagor fully understands the problem and what action needs to be taken. The notice must explain the nature of the default and the steps that should be taken by the mortgagor to rectify the matter. For instance, the notice should indicate whether the mortgagor is required to merely pay the outstanding instalments or whether the balance of the entire loan

⁶ Mark Hilton and Jeanette Barbaro, 'Managing the Mortgagor and Mortgagee Relationship' (2009) 16 *Australian Law Journal* 204.

⁷ *Conveyancing Act 1919* (NSW) s 109; *Property Law Act 1974* (Qld) s 83; *Law of Property Act 1936* (SA) s 47; *Property Law Act 1958* (Vic) s 101; *Conveyancing and Law of Property Act 1884* (Tas) s 21; *Property Law Act 2000* (NT) ss 86, 90.

⁸ A system of land title by registration that confers an indefeasible title on the registered proprietor. See, for example, *Frazer v Walker* [1967] AC 569.

⁹ *Property Law Act 1900* (NSW) s 58; *Land Title Act 1994* (Qld) s 78; *Real Property Act 1886* (SA) s 133; *Land Titles Act 1980* (Tas) s 78; *Transfer of Land Act 1958* (Vic) s 77; *Transfer of Land Act 1893* (WA) s 108; *Land Title Act 2000* (NT) s 80; *Land Titles Act 1924* (ACT) s 94.

¹⁰ *Property Law Act 1969* (WA) s 59(1)(b).

must be paid.¹¹ The mortgagor must be given the opportunity to repay the loan before the property is sold. Generally, the mortgagee cannot exercise the power of sale until one month after the default notice has been issued. However, legislation is generally silent on *how* or the *manner* in which the sale must be conducted and what the duties of the mortgagee are in this regard. There is, however, an extensive body of case law that provide guidelines for the proper sale of a property by the mortgagee. This section will consider the duty to act in good faith, selling at market value, and the timing of the sale.

Duty to act in good faith

There has been much judicial reasoning and academic debate over many decades on the nature of a mortgagee's duty in respect of the interest of the mortgagor when exercising a power of sale, and whether a mortgagee has a duty to 'act in good faith' or has a 'duty of reasonable care', which is a higher duty and edges towards tortious liability. It is not the purpose of this article to engage in this debate or to trace the development of the law in this regard; this has already been tackled in depth by other authors.¹² Suffice to say that, although subject to ongoing debate, there is general agreement in Australian law that a mortgagee must act in good faith when exercising a power of sale. A case that is often cited for this proposition is *Pendlebury v Colonial Mutual Life Assurance Society Ltd* ('*Pendlebury*')¹³ in which the Court found that the mortgagee had disregarded the interest of the mortgagor by failing to adequately advertise the property and to obtain a fair price. The case sets down the general principle that a mortgagee has a duty to act in a fair

manner and not to disregard the interests of the mortgagor. In this case Griffith CJ (citing the rule laid down by Herschell LC in the case of *Kennedy v De Trafford* 1896, 1 Ch 762) stated that '[I] am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor'.¹⁴

This position was once again reiterated and summed up in *Forsyth v. Blundell*¹⁵ in which Menzies J stated the following:

The rule to be applied here is not in doubt; it was stated authoritatively by Lord Herschell in the last century. In *Kennedy v. De Trafford* (1897) AC 180, which has been followed by this Court in *Barns v. Queensland National Bank Ltd.* (1906) 3 CLR 945 and *Pendlebury v. Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676, the Lord Chancellor said (1897) AC, at p 185:

'... if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. Lindley L.J. in the Court below, says that "it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor." Well, I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words "good faith", but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith.'

¹¹ *Transfer of Land Act 1893* (WA) ss 106-108; see also Torrens legislation in other jurisdictions, above n 9; William Duncan and William Dixon, *The Law of Real Property Mortgages* (2007) 193-198; Samantha Hepburn, *Principles of Property Law* (2006) 374.

¹² See especially, Gerard Kelly, 'The Mortgagee's Duty on Sale: Retracing Some Well Worn Paths' (1998) 6 *Australian Property Law Journal*; Peter Butt, *Land Law* (2005) and Duncan & Dixon, above n 11.

¹³ *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676.

¹⁴ *Ibid.*

¹⁵ *Forsyth v. Blundell* [1973] HCA 20, 481, in which the mortgagee sold a property for \$120,000 to a second purchaser by means of a private sale and did not inform the first purchaser of the sale who had expressed an interest in purchasing the property for \$150,000.

Therefore, the accepted view is that, although a mortgagee is acting in his or her own interest and not for the mortgagor, a mortgagee is nonetheless obliged to act in good faith and not to 'recklessly' disregard the interests of a mortgagor when exercising a power of sale. Kelly notes that Australian state courts have 'overwhelmingly preferred the good faith test'.¹⁶ This has also been incorporated in some statutory law.¹⁷ There is, however, no specific definition of 'good faith'. Whether or not a mortgagee has acted in good faith is decided on a case by case basis; the courts will consider the circumstances of the case and take into account a number of factors. For example, the courts will consider the manner in which the property was advertised, the method by which the property was sold, who sold the property, the nature of the purchaser, the price obtained for the property, and the timing of the sale.¹⁸ The latter two aspects are considered in more detail below.

Selling at market value

A key question that arises when mortgagees exercise a power of sale 'in good faith' is whether there is a duty to 'get the best price' or at least 'market value' and not less.¹⁹ The mortgagor will invariably want the best price to at least cover the debt and hopefully walk away with some surplus. However, as a mortgagee does not act for the mortgagor, he or she does not necessarily have to get the 'best price': 'The power of sale is given to [the mortgagee] entirely for his own benefit, and its purpose is to enable him to realize enough to satisfy his claim, if the property will produce it, and to return whatever balance may remain to the mortgagor. It is undoubted

law that so long as he observes specified formalities and acts in good faith his conduct cannot be challenged'.²⁰ However, as already discussed above, this does not mean a mortgagee can wholly disregard the interests of a mortgagor and act to a mortgagor's disadvantage. Although the mortgagee is entitled to give priority to his or her own interests, a mortgagee must still consider the interest of the mortgagor.²¹ In *Commercial and General Acceptance Ltd v Nixon*²² Gibbs CJ also stated that '[a]lthough a mortgagee is not a trustee of the power of sale for the mortgagor, it is nevertheless clear that in conducting a sale of the mortgaged property he is not entitled to sacrifice the interest of the mortgagor in the surplus of the proceeds of the sale. It is equally clear that the mortgagee must exercise the power in good faith'.

By acting in good faith, a mortgagee is expected to take reasonable steps to obtain a fair price for the property and failure to do so may amount to a breach of his or her duty: 'He [the mortgagee] is bound to sell fairly, and to take reasonable steps to obtain a proper price; but he may proceed to a forced sale for the purpose of paying the mortgage debt'.²³ Moreover, Griffith CJ accepted that 'in the case of a sale by a mortgagee, if he omits to take obvious precautions to ensure a fair price, and the facts show that he was absolutely careless whether a fair price was obtained or not, his conduct is reckless, and he does not act in good faith'.²⁴ This was also considered in *Nilrem Nominees Pty Ltd v Karaley Ltd*²⁵ in which the following was stated:

¹⁶ Above n 12, 15.

¹⁷ See, for example, *Transfer of Land Act 1958* (Vic) s 77 which states that a sale by a mortgagee must 'be in good faith and having regard to the interests of the mortgagor...'

¹⁸ See, for example, *Barns v. Queensland National Bank Ltd* (1906) 3 CLR 945; *Pendlebury v. Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676; *Forsyth v Blundell* (1973) 129 CLR 477.

¹⁹ In Queensland and the Northern Territory this is governed by statute: *Property Law Act 1974* (Qld) s 85(1) and *Law of Property Act 2000* (NT) s 90, which states that '[i]t is the duty of a mortgagee, in exercising the power of sale (whether conferred by an Act or an instrument of mortgage), to take reasonable care to ensure that the property is sold at its market value'.

²⁰ *Pendlebury* (1912) 13 CLR 676 (Isaacs J). See, also *Upton v Tasmanian Perpetual Trustees Pty Ltd* [2006] FCA 1008, 55 in which Heerey J states that 'a mortgagee is under no obligation to spend further money on matters which might theoretically improve the value of the mortgaged property'.

²¹ See, for example, *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309.

²² *Commercial and General Acceptance Ltd v Nixon* (1981) HCA 70, 3. See also *Investec Bank (Australia) Ltd v Global Pty Ltd* [2009] VSCA 97.

²³ *Pendlebury* (1912) 13 CLR 676 (Barton J).

²⁴ *Pendlebury* (1912) 13 CLR 676.

²⁵ *Nilrem Nominees Pty Ltd v Karaley Ltd* (2000) WASC 82, 2.

According to the Full Bench in *Southern Goldfields Ltd v General Credits Ltd* (1991) 4 WAR 138, a mortgagee's obligation on exercising the power of sale is to *bona fide* endeavour to obtain the best price reasonably available in all the circumstances of the case. One factor to consider when assessing whether a mortgagee is in breach of this obligation is whether the mortgagee has taken reasonable precautions to obtain a proper price. If the mortgagee has wilfully or recklessly sacrificed the interests of the mortgagor, then the mortgagee has not acted *bona fide*.

It is generally accepted that it is a measure of 'good faith' for the mortgagee to obtain a 'fair price' or the market value at the time the property is sold. The term 'market value' 'is the price a willing vendor would sell the asset to a willing buyer, where neither is so anxious as to overlook normal business and commercial consideration and both are in possession of all the necessary information to determine the value of the relevant asset'.²⁶ The courts have also held that in obtaining a fair price or market value it is important to obtain a proper and expert valuation of the property, especially if sold by private sale²⁷ and not auction, and to ensure the valuation is current. This is illustrated in the recent Queensland Supreme Court decision of *Sablebrook P/L v Credit Union Australia Ltd*.²⁸ In this case, the mortgagee sold the property to a purchaser for \$240,000 in April 2003. The property had been valued for \$225,000 in December 2002. The mortgagee did not seek expert valuation advice or obtain an updated

valuation, and they did not have information on market trends. Applegarth J stated:

I find that its [the mortgagee's] failure to obtain an updated valuation in April 2003, an updated valuation opinion from HTW or at least, an estimate of current market value from local real estate agents breached its statutory duty in circumstances in which it had no reliable information concerning the current market value of the land it proposed to sell by private treaty.²⁹

The Court awarded the plaintiff the amount of \$44,000, which was the difference between the sale price and the market value, which was \$53,000 less \$9000.

Recent developments have seen the inclusion of a statutory duty to sell at market value when a mortgagee exercises the power of sale. In Western Australia, the *Property Law (Mortgagee's Power of Sale) Amendment Bill 2009* was introduced on 20 August 2009 as a private member's bill by the Hon Dr Sally Talbot. The aim of the bill is to amend s 59 of *Property Law Act 1969* to include a section that creates a statutory duty that will require mortgagees or chargees to 'take reasonable care to ensure that the [mortgaged] land is sold not for less than its market value'. According to Dr Talbot the purpose of the bill is 'to protect the financial interests of people in the Western Australian community who find themselves unable to maintain payments on their home mortgages'.³⁰ Dr Talbot further states that 'the interests of homeowners whose homes are subject to forced sales are best served when the market value of the house is realised'.³¹ In short, the amendments will 'stop banks and financial institutions from holding "fire sales"³² related to defaulted mortgages'.³³ Therefore, the new provision requires a mortgagee to ensure that the

²⁶ Hilton and Barbaro, above n 6, 211, citing *Spencer v Commonwealth* (1970) 5 CLR 418. This definition is similar to the definition found in the USA case *United States v Cartwright*, 411 US 546 (1973) that defines 'fair market value' as 'the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts' <<http://supreme.justia.com/us/411/546/>> at 8 September 2009.

²⁷ In *Nilrem Nominees Pty Ltd v Karaley Ltd* (2000) WASC 82, the fact that the mortgagee failed to obtain a valuation 'is an indication of a lack of prudence' (para 3). However, it was held that the extensive advertising made up for the lack of valuation: 'A lack of a valuation would be most significant if a property was sold for a low price after an inadequately advertised auction or after an inadequately advertised private sale' (para 8).

²⁸ *Sablebrook P/L v Credit Union Australia Ltd* [2008] QSC 242.

²⁹ *Sablebrook P/L v Credit Union Australia Ltd* [2008] QSC 242, 42.

³⁰ Western Australia, *Parliamentary Debates*, Legislative Council, 20 August 2009, 6245c-6246a (Hon Dr Sally Talbot) <<http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframepages/Hansard+Search>> at 7 September 2009.

³¹ *Ibid*.

³² A term used to describe the sale of goods, including property, at much reduced prices.

³³ Above n 30.

land is sold for not less than its market value if it has an ascertainable market value when it is sold, or in any other case, the best price that can be reasonably obtained in the circumstances.

The introduction of the Western Australian amendment follows closely on the heels of the amendment to the Queensland *Property Law Act 1974* and the New South Wales *Conveyancing Act 1919*. The *Property Law (Mortgage Protection) Amendment Act 2008* (Qld) amends s 85 of Queensland's *Property Law Act 1974*. The amendments are in response to the global economic crisis and to also protect homeowners from mortgagee fire sales.³⁴ The duty of a mortgagee to sell a property at market value is extended to include an 'attorney for the mortgagee, or a receiver acting under a power delegated to the receiver'³⁵ by a mortgagee, to take reasonable care to ensure that the property is sold at the market value'. Receivers are now subject to the same obligations as mortgagees. Furthermore, if the mortgage is a prescribed mortgage,³⁶ the mortgagee or receiver must, unless there is a reasonable excuse:

- adequately advertise the sale; and
- obtain reliable evidence of the property's value; and
- maintain the property, including by undertaking any reasonable repairs; and
- sell the property by auction, unless it is appropriate to sell it in another way.

³⁴ Damien Butler and Kristie Fitzgerald, 'Changes to Mortgagee's Duties When Exercising Right of Sale', December 2008, <<http://www.deacons.com.au/legal-services/banking-finance/legal-updates/legal-update.cfm?objid=6763>> at 7 September 2009.

³⁵ A mortgagee may appoint a receiver to manage the property. The receiver acts as an agent for the mortgagee.

³⁶ This term is not defined, however, Damien Butler and Kristie Fitzgerald note that it is intended to 'capture mortgages over land of a consumer credit nature' (above n 34). See also *Property Law Regulation 2003* (Qld) s 4 for a definition of 'prescribed mortgage' and the Queensland, *Parliamentary Explanatory Notes*, Legislative Assembly, 3 December 2008 (Kerry Shine) <<http://www.legislation.qld.gov.au/Bills/52PDF/2008/PropL MortPrAB08Exp.pdf>> at 9 October 2009.

Likewise, the New South Wales *Conveyancing Legislation Amendment Act 2009* inserts s 111A in the *Conveyancing Act 1919*. Section 111A(1) states that:

A mortgagee or chargee, in exercising a power of sale in respect of mortgaged or charged land, must take reasonable care to ensure that the land is sold for:

- (a) if the land has an ascertainable market value when it is sold—not less than its market value, or
- (b) in any other case—the best price that may reasonably be obtained in the circumstances.

It is worth noting that these amendments are in line with s 420A of the *Corporations Act 2001* (Cth) where the mortgagor is a corporation:

[i]n 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.

Although Australian courts have favoured the doctrine of 'good faith' when determining the mortgagee's conduct, the Queensland and New South Wales provision as well as the proposed statutory amendments for Western Australian, which is essentially the same wording as the other two states' amendments, refer to the duty of the mortgagee to take 'reasonable care' or 'reasonable measures' to obtain market value or a fair price. The concepts of 'reasonableness' and 'fairness' are not defined and this will be left to the courts to decide on a case by case basis, taking all the circumstances into consideration, whether the conduct was 'reasonable' and to interpret the meaning of 'reasonable care'. The use of this wording in the statutes does little to settle the possible confusion as to whether the duty of the mortgagee is to act in good faith or whether the higher standard of 'reasonable care' will be applied. The statutory provisions echo the case law and

it might be that the wording does not create, or intended to create, a more onerous standard.³⁷

Timing of the sale

The timing of the sale is also a factor that needs to be taken into consideration when a property is sold by the mortgagee, which is linked to obtaining market value. As indicated above, the mortgagee's primary interest is to sell the property to recover the mortgage debt. There is no statutory duty or common law duty that requires the mortgagee to sell the property at the 'best time' or a time that is most advantageous for the mortgagor. The mortgagee is not obliged to sell the property at a time that is convenient for the mortgagor, and the mortgagor cannot insist that the mortgagee delay the sale, or postpone a sale, and wait for a more appropriate time.³⁸ Hepburn notes that there is no liability if a mortgagee fails to sell at a particular time.³⁹ It is generally in the interest of the mortgagee to sell the property as soon as possible to recover the debt.⁴⁰ However, as noted by Butt⁴¹ the mortgagee has the freedom 'if and when to sell' and this includes the 'right not to sell at all'. It is not a breach of duty if the mortgagee chooses not to sell. As already discussed, the mortgagee is nonetheless expected to act in good faith and not entirely disregard the interests of the mortgagor. In *Pendlebury Barton J*⁴² stated that 'if in the exercise of his [the mortgagee's] power he acts bone fide [in good faith] and takes reasonable precautions to obtain a proper price, the mortgagee has no redress, even [though] more might have been obtained for the property if the sale had been postponed'.⁴³

³⁷ Above n 12.

³⁸ Duncan and Dixon, above n 11, 233.

³⁹ Hepburn, above n 11, 375.

⁴⁰ Duncan and Dixon, above n 11, 233.

⁴¹ Butt, above n 12, 646.

⁴² *Pendlebury* (1912) 13 CLR 676 (Barton J citing Linley LJ).

⁴³ See also *Commonwealth Bank of Australia v Lee* (1996) 22 ACSR 574, in which the Supreme Court of Western Australia affirmed the principle of good faith enunciated in *Pendlebury* and held that '... a lack of bona fides and a failure to take reasonable steps will not be established merely by demonstrating that a mortgagee has not sold a security at a time when it might have realised its best price' (para 50).

Mortgagor remedies

The mortgagee's power of sale is essentially a remedy against a mortgagor who has not paid the mortgage loan and is in default. However, if a mortgagee fails to act in good faith and does not take reasonable steps to secure a fair price or market price, there are remedies available to the mortgagor for the mortgagee's breach of duty. The relief will depend on the nature of the contract.⁴⁴ If the mortgagee has sold the property 'and there is an enquiry into the propriety of the sale or adequacy of the price, the mortgagee in possession will be liable to account not only for the proceeds of sale received by him but also for those proceeds which he might have received "without wilful default"'.⁴⁵ The mortgagor can claim monetary relief, which may be the difference between the purchase price and the market valuation, as demonstrated in *Sablebrook P/L v Credit Union Australia Ltd*.⁴⁶ If the property has been sold, the mortgagor may also take action to have the sale set aside, for example, if the mortgaged property has been sold far below the current market value.⁴⁷ If the mortgagee has not sold the property, or is in the process of doing so, the mortgagor may apply to the courts for an injunction to prevent the mortgagee from proceeding with the sale.⁴⁸ An injunction may be sought, for example, if the mortgagee is not taking reasonable steps to advertise properly and to get a fair price.

Conclusions and guidelines for practice

There is now an extensive body of case law that recognises the mortgagee's duty to act in good faith when exercising a power of sale. Although the mortgagee is not a trustee for the mortgagor and has the right to exercise a power of sale for his or her own

⁴⁴ Hepburn, above n 11, 378.

⁴⁵ *Mijac Investments Pty Ltd v Graham* (No 2) [2009] FCA 773, 25. See also *Nolan and MBF Investments* [2009] VSC 244 for an exposition on the remedy of account or profits.

⁴⁶ *Sablebrook P/L v Credit Union Australia Ltd* [2008] QSC 242.

⁴⁷ See, for example, *ANZ Banking Group Ltd v Bangadilly Co Pty Ltd* (1978) 139 CLR 195.

⁴⁸ See, for example, *Forsyth v Blundell* (1973) 129 CLR 477; *Allfox Building Pty Ltd v Bank of Melbourne Ltd* (1992) NSW Conv R 55-634.

benefit, it does not mean that the mortgagee can act indifferently towards the mortgagor. The courts have consistently held that a mortgagee is obliged to act in good faith, which includes taking reasonable steps to obtain a proper price for the property sold. Mortgagees are obliged to obtain market value or a 'fair price'. As noted by Duncan and Dixon⁴⁹ if 'it can be demonstrated that the price obtained was substantially below the true value, this may be evidence that proper steps were not taken' to get a fair price. However, the mortgagee does not have to delay a sale or sell at a time that is most suitable for the mortgagor. The mortgagee's duty to take reasonable steps to sell the property at market value is now incorporated in some state statutes, notably Queensland, Northern Territory and New South Wales. There is also a bill currently before the Parliament of Western Australia to amend the *Property Law Act 1969* to include a statutory duty to sell mortgaged property at market value. The law, therefore, imposes a greater duty on mortgagees when they exercise their power of sale. Failure to act in good faith or to obtain market value may lead to the sale of the property being set aside, monetary damages or an injunction to prevent the sale from proceeding. Therefore, it is important for mortgagees to adopt practices that ensure the manner in which they exercise their power of sale is lawful.

Case law and recent statutory developments in Western Australia, and other states, provide a number of practical guidelines for when a mortgagee, for example banks and other financial institutions that provide mortgage loans, exercises a power of sale:

- take reasonable steps to get the best possible price;
- seek expert advice on the market value of a property;
- appoint an independent property valuer;
- obtain reliable trend data on property values;⁵⁰

- use current property valuations and the market value at the time of the sale; and seek advice on the most appropriate method of selling a property that will help obtain a proper price..

⁴⁹ Duncan and Dixon, above n 11, 233.

⁵⁰ It is noted that concepts such as 'reliable', 'reasonable', 'proper' and so forth are not defined in legislation and are subject to interpretation by the courts.