

PRESENTERS



Mark Hopkinson, AlexanderDorrington, Auckland

Mark has 20 years experience as a commercial lawyer, mostly in the areas of securities law, financial services, financing, insolvency and recoveries. Mark has been extensively involved in a large number of mortgagee sales of various forms of property, particularly during the recent economic downturn. Although usually engaged by the mortgagee, he has advised mortgagors on how best to deal with an impending mortgagee sale. Mark is an editor of the Chartered Accountants Manual and a mentor for Auckland University Business School's SPARK programme.



Justin Toebe, JTLaw, Wellington

Justin is a leading conveyancing litigation practitioner in the areas of credit recovery and reconstruction, including mortgagee sales. His experience and strength of personality allow for a prompt and full outcome. Justin has recently established his own firm, JT LAW, having spent many years as a partner at Buddle Findlay. Justin was a presenter for our 2007 seminar on mortgagee sales.

CONTENTS

1. INTRODUCTION.....	1
2. PREPARATION.....	3
BACKGROUND.....	3
PREPARATORY WORK – CHECK THE DOCUMENTS AND OBTAIN SEARCHES.....	3
SEARCHING CHECKLIST.....	5
IDENTIFY DEFAULTS.....	5
PARTY INFORMATION.....	6
GST.....	6
3. POWER OF SALE.....	7
REQUIREMENT FOR NOTICE.....	7
FORM OF NOTICE – S 120 PLA	7
FORM 1	8
NOTICE TO MORTGAGOR OF MORTGAGED LAND OF EXERCISE OF POWERS BY REASON OF DEFAULT	8
<i>Notes for mortgagee or receiver completing notice</i>	9
ACCELERATION.....	12
SERVICE.....	13
CURRENT MORTGAGOR.....	16
SECTION 118 – EXTENDED NOTICE PERIOD.....	16
COVENANTOR/GUARANTORS – SS 121 AND 122 PLA.....	17
MAORI FREEHOLD LAND	18
4. DUTY OF CARE.....	19
OPPRESSIVE CONDUCT – CREDIT CONTRACTS AND CONSUMER FINANCE ACT	24
REMEDY FOR BREACH	24
THE MORTGAGEE SALE DISCOUNT?	25
5. POSSESSION OF THE MORTGAGED PROPERTY	27
RESIDENTIAL TENANCIES	27
MORTGAGOR IN POSSESSION.....	29
COMMERCIAL TENANCY – MORTGAGEE CONSENT.....	30
<i>Mortgage of lease – relief against cancellation by landlord</i>	32
<i>Risk to pass on unconditional date, or settlement?</i>	32
6. CLEARING THE TITLE.....	35
CAVEATS	36
CHARGING ORDERS	38
NOTICES OF CLAIM UNDER THE PROPERTY (RELATIONSHIPS) ACT	39
STATUTORY LAND CHARGES	40
CRIMINAL PROCEEDS (RECOVERY) ACT 2009 (“CPRA”)	40
7. THE SALE PROCESS.....	43
PRIVATE SALE (AS AN ALTERNATIVE TO COURT SALE)	43
ENGAGING THE AGENT.....	43
VALUATIONS	44
THE LISTING AGREEMENT	44
METHOD OF SALE.....	45
ADVERTISING.....	46
REGISTRAR SALE.....	46
BUYER INFORMATION	47
TIMING OF SALE	47
TERMS AND CONDITIONS OF SALE	48
SALE DOCUMENTS FOR FARMS	49
TAKING POSSESSION TO PROTECT THE PROPERTY.....	50
ACCOUNTING FOR SALE PROCEEDS	50

<i>Amounts reasonably paid or advanced at any time by the mortgagee – s 185(2).....</i>	51
<i>Legal costs.....</i>	51
<i>Rates.....</i>	51
<i>Body corporate levies.....</i>	51
<i>GST.....</i>	52
<i>Other sale expenses.....</i>	54
<i>Real estate agents' commission.....</i>	54
<i>Other Interests.....</i>	55
MARSHALLING.....	55
8. MORTGAGEE IN POSSESSION	57
WHAT CONSTITUTES POSSESSION BY A MORTGAGEE?	57
ENTRY INTO POSSESSION.....	57
POWERS AND OBLIGATIONS OF THE MORTGAGEE IN POSSESSION.....	59
<i>Notices and reports</i>	60
<i>Mortgagee in possession of lessee's interest.....</i>	61
<i>Resource Management Act ("RMA").....</i>	62
APPLICATION OF INCOME RECEIVED BY MORTGAGEE IN POSSESSION	63
<i>Withdrawal from position of mortgagee in possession</i>	64
9. SPECIAL POSITIONS.....	65
SECOND MORTGAGEE.....	65
<i>Right to purchase first mortgage debt.....</i>	65
<i>Priority arrangements between mortgagees</i>	65
<i>Subsequent mortgagee power of sale</i>	66
MORTGAGEE MAY ADOPT MORTGAGOR'S AGREEMENT FOR SALE AND PURCHASE	66
MORTGAGEES AND RECEIVERS.....	69
<i>Distinction</i>	69
<i>Acceleration – receivers.....</i>	69
<i>Sections 119, 121 and 122 PLA default notices – receivers.....</i>	70
<i>Application of proceeds of sale of mortgaged property by receiver</i>	70
<i>Reporting and other obligations</i>	70
<i>Section 17 Receiverships Act – mortgagee refusal to consent to sale.....</i>	71
<i>Receivership – advantages</i>	71
RIGHT OF MORTGAGEE TO PURCHASE PROPERTY FROM ITSELF AT MORTGAGEE SALE – S 200 PLA	72
10. NOTICES REQUIRED – MORTGAGEE SALE OF GOODS	77
APPENDIX 1 – PARTICULARS AND CONDITIONS OF MORTGAGEE SALE BY TENDER	81
APPENDIX 2 – PARTICULARS AND CONDITIONS OF MORTGAGEE SALE BY AUCTION	89
APPENDIX 3 – ADLS AGREEMENT FOR ATTACHMENT TO TENDER AND AUCTION PARTICULARS	95
APPENDIX 4 – ORIGINATING APPLICATION TO REMOVE CAVEAT	111
APPENDIX 5 – SECTION 5(2)(A) GST.....	117