MTG-02 Mortgages - variations

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1 Mortgage of Lease

Leases often state in the lease that consent in writing of the lessor is required to encumber the lease. In these instances, the lessors consent must be attached or endorsed on the form. For transactions over Crown land, s.18 of the LAA consent of the Minister for Lands is also required unless the Crown land is vested for purposes of another Act.

The lessee’s copy of a lease is not required to be produced with a mortgage of a lease.

A lease of Crown land by the State of Western Australia created under s.48 of the LAA over an unmanaged reserve for a purpose different to the reserve purpose cannot be mortgaged. A lease of Crown land by the State of Western Australia created under s.47 of the LAA over an unmanaged reserve for a purpose in accordance with the reserve purpose can be mortgaged.

2 Mortgage by a Joint Tenant of that Interest

It should be noted that a mortgage of one joint tenant’s interest, being a charge only, does not sever the tenancy. The mortgagee’s interest in the land may die with the mortgagor should the mortgagor fail to survive the other joint tenant, but this is not certain (see Francis- Mortgages and Securities 2nd Edition (1975) pages 56 and 57 and Lyons v Lyons (1967) VR169).

In the event that such a mortgage is registered, and the mortgagor dies before the other joint tenant, a discharge of mortgage is required to clear the title.

The exercise of a power of sale by a mortgagee in these circumstances would sever the joint tenancy.

3 Mortgage by a Life Tenant
A life tenant, having an estate and interest in land, may mortgage that estate or interest. However, the life estate, being terminable, would cease on the death of the life tenant, and, with it the interest of the mortgagee.

In the event that such a mortgage is registered and the mortgagor dies, on an application by the remainderman to merge the two estates, a discharge of mortgage is required to clear the title.

4 Mortgage by a Remainderman

The remainderman also has an estate or interest in land capable of being mortgaged. On the death of the life tenant the interest of the mortgagee enlarges to cover the fee simple in possession.

5 Mortgage by Personal Representative

Where, on the death of a registered proprietor, an executor or administrator has entered transmission and became registered as proprietor of the land to be mortgaged, such executor or administrator may mortgage the land:

- For the purpose of administration (s.10(3) of the Administration Act 1903). A statutory declaration setting out the circumstances is required.

- Where power to mortgage is given in the will. Production of an office copy of the Grant of Probate is the only evidence required.

- With the consent of all the beneficiaries where no power to mortgage is given in the will. A statutory declaration identifying the beneficiaries is required where the beneficiaries are not named in the will.

and

- Pursuant to the Trustees Act 1962. s.30(1)(a)(c)(d)(e)(h) and s.43 permits a trustee (executor or administrator) to mortgage under the circumstances set out therein. A statutory declaration setting out the circumstances is required.

6 Mortgages - Double Interest

Provided there is only one principal sum, that is, one amount of money lent to the mortgagors, then one mortgage may be registered on the joint and/or separate lands of the mortgagors.

Successful registration of this type of mortgage depends not only upon accurate description but also upon careful separation of the lands being mortgaged and the inclusion of separate mortgaging parts for each interest mortgaged.

The same considerations apply where the mortgagor is two persons and part of the subject land is held by them as joint proprietors and part by one of them in his or her own right. The form is the same with appropriate changes in detail.

7 Up Stamping a Mortgage
Any further advances in excess of that amount were deemed to be a new and separate instrument of security and were protected by resubmitting a duplicate of the registered mortgage to the Office of State Revenue (Stamp Duties Division) for payment of the additional duty. (or, for those corporations so authorised, updating the duty using the procedures set out in Sec. 112V of the Stamp Act). In accordance with s.83(7) of the Stamp Act, the payment of additional stamp duty on the duplicate mortgage has the same effect as if the original registered mortgage held at Landgate was up stamped.

The practice was known as Up Stamping a mortgage. Although the payment of the additional stamp duty maintains the duplicate mortgage as a valid and enforceable security document for the new, increased amount, the mortgage registered in the Titles Register remained unchanged (i.e. showing the stated principal sum). The common law rules of equity decide the circumstances in which the increased amount will have the same priority as the first mortgage against any later mortgages. (The rule of Hopkinson v. Rolt).

8 Extension of Mortgage

The TLA, s.105A, provides that a mortgage may be extended. In any extension of a mortgage:

- the term of the mortgage must be extended by at least one day

- there cannot be any increase in the principal sum of the mortgage. A further mortgage is required if the principal sum is to be increased

- where the extension pertains to a demand mortgage a finishing date is required to be stated

- where the extension indicates that part of the principal sum has been repaid, then the extension must be preceded by a partial discharge of the mortgage as to the amount repaid

- a variation of the interest rates and other terms may be incorporated in the extension provided some extension of the time period is made. A variation of mortgage by itself is not permitted

- being an instrument defined under the TLA registration of the extension is prevented by absolute caveats, property (seizure and sale) orders and certain memorials until removed and

- both mortgagee and mortgagor must sign in the presence of an adult witness and the address and occupation of the witness must be shown.

A person lodging an extension of mortgage should obtain the consent in writing of the proprietor of any mortgage or encumbrance lodged after the mortgage being extended [s.105A(3)]. Registration of the extension will not be refused if such consent is not obtained though it is practice to advise the lodging party that the consent is desirable.

9 Also see

- MTG-01 Mortgages
- MTG-03 Mortgages - document preparation
- MTG-04 Mortgages - discharges