In the case of Aodhcon LLP v Bridgeco Ltd [2014] EWHC 535 (Ch) the Court further considers the duties of a mortgagee to obtain the best price reasonably obtainable for a property. Similar principles apply when receivers are selling property. This case is also notable for its consideration of whether a facility fee is a penalty.

**Comment**

Similarly to the recent case of Meah v GE Money Home Finance Limited [2013] EWHC 20 (Ch), whilst the borrower's claim in Aodhcon LLP v Bridgeco Ltd [2014] EWHC 535 (Ch) was unsuccessful, lenders should continue to take care to adopt best practice when selling as mortgagee in possession. Whilst this case does not create new law, it illustrates that the court will take a robust attitude and that a mortgagee will only have breached its duty if it is plainly on the wrong side of the line. The case confirms that the focus should not be on value alone – but on the context of the sale and the circumstances as a whole. The mortgagee's selling decisions in these circumstances were within an acceptable margin of error.

Lenders should also note this case and take comfort from the fact that a contractual obligation to pay a facility fee will not be construed as a penalty at the point at which the lender seeks to recover this from its customer, simply because the lender has granted indulgence on this payment historically.

**The Facts**

The claimant company, Aodhcon, was engaged in the acquisition and development of a property. The property was purchased by Aodhcon in March 2008 for a purchase price of £640,000. The acquisition was funded by Bank of Scotland, secured by a first legal charge. Aodhcon sought funding in the form of a bridging loan from Bridgeco when the development did not proceed quickly and the original loan was due to expire. The bridging loan was due to be repaid in April 2010, but this was extended to 7 November 2010. In late November 2010, the prospect of selling the property was considered and the property was ultimately sold in March 2011 for the sum of £852,000.

Following the sale, Aodhcon issued proceedings against Bridgeco, claiming, inter alia, that Bridgeco had been in breach of its duty as mortgagee to obtain the best price reasonably obtainable, since it had obtained a price significantly lower than one it ought to have obtained. Aodhcon submitted that Bridgeco ought to have achieved a sale price of £1.25 million. Further, it was contended that the facility fee payable on the loan by Aodhcon was a penalty.

**Decision**

In this case, the Court held that Aodhcon had properly marketed the property prior to repossession and that the market for a property of this type was likely to be limited list of investors who would be known to local agents. Bridgeco was therefore entitled to rely on this and so a targeted marketing campaign rather than an auction sale was justifiable.

It was held that Bridgeco’s duty had not been to sell at the best price reasonably obtainable but to take care to sell for that price. When considering the facts, the Court held that Bridgeco had not been in breach of its duty in the way it had marketed the property for sale and its selling decisions had been within an acceptable margin of error. On this basis, it was difficult to see how Bridgeco could have been in breach of its duty at all.

In respect of the facility fee, there was contractual obligation in the facility documentation upon Aodhcon to pay the facility fee at all times. Bridgeco had previously granted indulgence on this payment, in the absence of default. This indulgence did not undermine the fact that Aodhcon continued to be contractually obliged to pay the facility fee and there was nothing in case law to suggest that the predominant contractual function of the facility fee had been to deter Aodhcon from defaulting.

**Duties of the Mortgagee**

If the mortgagee decides to exercise its power of sale, it owes the mortgagor a specific duty to take reasonable care to obtain the best price reasonably available at the time (Dean v Barclays Bank plc [2007] EWHC 1390 (Ch)). This is normally the market value of the mortgaged property at the date of exchange of contracts, not the market value at the time the decision to sell was made. Interestingly, in this particular case, the deputy Judge took into account the fact that repossession can taint a sale price.

There is no duty on the mortgagee to take steps to improve the property, although the mortgagee will be under a duty to bring to the attention of prospective purchasers the potential advantages that might be achievable. There is no obligation on the mortgagee to market the property for any specific length of time but if an offer below the valuation price is accepted, then the mortgagee will need to be sure that it has advertised the property widely and for a reasonable length of time. Lenders should be guided by their instructed surveyors as to value and method of sale of a property. It could be considered best practice for a mortgagee to advertise that it has received an offer and ask for offers in excess of that price to be made by a certain date. The mortgagee can then be confident that any challenge by an aggrieved mortgagor is unlikely to succeed.

The mortgagee must take reasonable steps to obtain a proper price for the asset (Cuckmere Brick Company Ltd v Mutual Finance Limited [1971] Ch 949) and must expose the property sufficiently to the market to ensure that all potential purchasers are given notice of the sale and an opportunity to put in an offer if they choose. The mere fact that a higher price might have been obtained does not mean that the duty of the mortgagee has been breached.

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