A Mortgage maybe defined as:

"A conveyance of land… as a security for the payment of a debt or the discharge of some other obligation"[1]

Our scenario is concerned with Angela who has taken a mortgage of £80,000 on her lease held property from Skin Deep ltd. Angela has secured her loan by way of a legal charge. Under the LPA 1925, S.87 which provides that the effect of such a mortgage is to give the mortgagee the same protection, powers and remedies as if the mortgage had been made by a sublease. This will be advantageous to Angela as it would not amount to a breach of covenant against subletting as no actual sublease is created.[2]

Angela's shop is not doing well, and she has been made an offer from Touch Tone ltd to purchase the shop lease. However the legal charge Angela has signed contains certain provisions which prevent Angela from releasing herself or her shop from the legal mortgage. Angela has also signed another separate document which states that if Angela was to sell she would offer, first to Skin Deep ltd. The validity of this document needs to be considered. We need to consider whether these provisions in the legal charge are valid or can be seen as clogs thus void able.

UNDUE POSTPONEMENT

Many mortgages have clauses in them which prevent the mortgagor from redeeming before a fixed date. Mainly these clauses are of benefit to the mortgagee. But have been justified on the ground that the mortgagees are taking the risk and trouble to put their money at interest, thus should gain some benefit. The courts rarely intervene because they believe it is essentially a matter of contract between the mortgagor and mortgagee. The courts will only intervene in circumstances where the contractual

[1] Santley v Wilde (1989) 2 CH 474
[2] Grand Junction co. ltd v Bates (1954) 2 QB 160

postponement effectively renders the equity of redemption illusory or valueless.

This can be illustrated in Fairclough v Swan Brewery Ltd[3] in this case a clause which provided that a mortgage was redeemable only one month before the expiration of the mortgagors lease, leaving the mortgagor with no property worth redeeming was held to be void.

However this was an exceptional decision of the courts for equity to intervene. The courts will rarely challenge the postponement date of redemption on the grounds that the period is not reasonable. This can be demonstrated in the case of Knightsbridge Estates trust ltd v Byrne[4], Green MR said that a postponement would be bad unless it was in some way "oppressive or unconscionable". In this case, a postponement of the right to redeem for 40 years was upheld. The reason being, the mortgagee has provided the mortgagor with finance at a time when credit was difficult to obtain. The parties were two large business associations and there was a reciprocal agreement that the mortgagee would not call in the loan for the period of postponement.

The plaintiffs used as a defence the principle of Debenture under the provisions of s. 74 of the Companies Act. 1929. Which provides one exception to the rule that a mortgage can be irredeemable. If the mortgagor is a company registered under the act and has given a written acknowledgement that this term is a debenture. How ever this line of argument failed and it was held that it did not apply to the mortgage deed. This line of argument may not apply in Angela's case as it does not seem from the facts that there was a debenture in the mortgage deed.

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[3] (1912) AC 565
[4] (1939) CH 441

In our case, Angela would still have 4years of her lease, if she was to redeem after 25 years. So that the postponement period would not appear to be illusory as in Fairclough. However Angela does not appear to be in a large commercial undertaking, as in Knightsbridge Estates. Perhaps this could suggest that there was not equal bargaining power between Angela and Skin deep ltd. Nor was she of the age, competency or knowledge to determine that the mortgage transaction would be of beneficial to her. There is no evidence of a reciprocal arrangement by skin deep ltd. It may therefore be possible for Angela to obtain a declaration from the court that the postponement is oppressive and therefore void.

One of the provisions in the mortgage impose 8% above normal rate interest rates on Angela. This could be seen as excessively high interest rates which can be regarded as "oppressive or unconscionable" then equity will intervene and declare such provisions void.

This was illustrated in in Cityland v Dabrah[5] a lump sum payment, which would have meant that the purchaser paid an interest rate of 57 percent. When spread over the period of the mortgage, was varied to give a rate of 7 percent, was held to be void.

However it will not necessarily be oppressive or unconscionable to link both capital and interest to a particular index. In Multi service bookbinding ltd v Marden[6] outstanding capital was recalculated according to the exchange rate with the swiss franc, which after inflation and devaluation of sterling, doubled the original loan. However as the provision was made to protect the mortgagee and not to take advantage of the mortgagor, it was upheld. It is therefore probable that the recalculation of capital outstanding on Angela's loan will be valid.

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[5] (1968) CH 166
[6] (1979) CH 84

However Angela may rely on the Consumer Credit act 1974 which gives statutory force to terms in the mortgage which are "oppressive and unconscionable". SS137- 140 of the act gives the court power to reopen a credit agreement where it finds the credit bargain extortionate. But in order to be a credit agreement under the act, the agreement must be between a creditor and an individual. Angela will satisfy this condition, because the agreement has been made between herself and Skin Deep ltd. In determining whether a credit bargain is extortionate the court will examine evidence concerning interest rate prevailing at the time it was made.[7]

As Angela has a previous record for having problems with paying off loans. The interest rate may be justified and held valid, due to the risk involved.

An important decision in this area is of A Ketley ltd v Scott[8] in which the application of SS 137- 140 were made for the first time by the high court. It was held in this case by Foster J that an annual rate of interest of 48% was not extortionate. A borrower who represent an exceedingly poor risk, will in turn justify the execution of a high rate of interest. Where the wife re-mortgages the house to stave off her husbands bankruptcy. It will be held that the high interest rates are justified because of the "appalling record in relation to payments" and the risk involved given the "parlous financial condition".(Woodstead Finance v Petrou)[9]

The provision which prevents Angela from purchasing any other beauty products apart from Deep Skin ltd for her shop till the lease runs out may be regarded as a collateral advantage. This type of collateral advantage is referred to as a "solus tie" Although the basic purpose of a mortgage is to provide security for the

[7] CCA 1974 S.132 (2) (A)
[8] (1980) CCLR 37
[9] (1986) Times, 23 January.

repayment of the money lent by the mortgagee, in cases of commercial properties the lender may succeed in negotiating for some additional (collateral) advantage. Originally the courts view on such collateral advantages taken by the lender were void. This was they were regarded as a disguised form of interest contravening the usury laws (Jennings v Ward)[10]. In 1854, the last of the statutes dealing with usury was repealed and there after the courts attitudes to collateral advantage began to change.

Today the current law on equity is far different. Equity will not intervene and prevent a lender from stipulating for a collateral advantage. The law on collateral advantage can be summarised in the following propositions. Firstly a collateral advantage which exists until redemption can be valid (Biggs v Hoddinott), but will be void if it is oppressive or unconscionable (city land & property holdings ltd v Dabrah). A collateral advantage which exists beyond redemption is void. (Noakes & co ltd v Rice). Unless it is an independent transaction (krelinger V new Patagonia Meat & Cold storage co ltd).

In Noakes V Rice[11] the respondent bought a lease of a public house from the appellants who were brewers. This was with the help of a loan from the appellants, which was secured on a mortgage of the premises. The respondents covenanted, inter alia, that he and all persons deriving title under him would not, during the term of the lease, whether any money was or was not owning to the appellants under the mortgage loan, use or sell any malt liquors, except that from the appellants. Some time later the respondent wished to repay the loan and redeem the property free of the covenant. The appellants resisted his claim and the case went to the HOL. It was held that the covenant was a clog on the equitable right to redeem and as such the respondents upon payment of all monies outstanding under the mortgage, was entitled to have the property

[10] (1705) 2 Vern 520
[11] (1902) AC 24

re-conveyed to him free of the collateral advantage. The collateral advantage was unenforceable after redemption of the mortgage.

Lord Davey who gave one of the leading judgements was emphasising that the essential nature of a mortgage is that its purpose is to provide security for a loan with an inherent right vested in the mortgagor to redeem it on payment of the mortgage debt. He stated that:

"A mortgage must not be converted in to something else;….. for the benefit of a mortgagee is part of the mortgage transaction…. comes to an end on payment of the loan"

Here Angela is required to purchase all her Beauty products from Skin Deep ltd 'until her lease runs out'. A collateral advantage which is limited in duration to the time of redemption is not inconsistent with the right to redeem and is therefore usually enforceable. However, here the collateral advantage is not restricted because it is to apply so long as Angela retains the lease. Such a collateral advantage is void (Noakes v Rice). Hence Angela may rely on this authority, unless it exists as an independent transaction. A leading authority on this part is Kreglinger v New Patagonia Meat & cold storage co .ltd[12]. in this case part of the consideration for a loan by wool brokers to a meat- preserving company was a right of pre- emption on any sheepskins for five years. As in Biggs v Hodinott[13], there was a reciprocal agreement not to call in the loan for five years. The HOL's felt that the rigid application of the doctrine of "no clogs on the equity of redemption" was inappropriate to what was essentially a commercial contract between two business parties.

Here it is submitted that the collateral advantage would not rank as an independent transaction, not least because it is to last as long as

[12] (1914) AC 25
[13] (1898) 2 CH 307

Angela retains the lease on the shop. In contrast to Kreglinger it was only to last for five years from the creation of the mortgage. Further the collateral advantage may also fail on the additional ground that it is an unreasonable restraint on trade and excessive under the common law rules.)Alec Lobb (Garages) ltd v Total oil Great Britain ltd)[14].

In Esso Petroleum V Harper's garage[15] the HOL's held that any restriction on trade contained in a mortgage deed are also subject to the general common law rules as to restraint of trade. it is also possible that this type of solus tie may constitute a form of anti-competitive practice prohibited by article 81 of the Treaty of Rome.

Finally the mortgage, in requiring Angela not to sell the shop without first offering it for sale to Skin Deep lt. Giving them a pre-emption if she decides to sell will offer it to skin deep ltd first. Equity will not allow a term which has the effect of preventing or limiting redemption.

In Samuel v Jarrah Timber & Wood paving corp[16]the court held that a term in a mortgage which gave the mortgagee an option to purchase the mortgaged property was void even if it was not oppressive. Reason being if option "exercised by the mortgagee would put an end to the mortgagors right to redeem i.e. would prevent him getting back his mortgaged property".

However, once the mortgage has been created, equity will not intervene if the mortgagor gives the mortgagee such an option. However the option was held to void in Lewis v Frank Lover ltd[17]

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[14] (1985) 1 WLR 173
[15] (1968) AC 269
[16] (1904) AC 323
[17] (1961) 1 ALL ER 446

although made on a separate deed, but the transaction was carried out on the same day as the mortgage transaction.

In contrast to this in Reeve v Lisle[18] an option to buy, which was granted to the mortgagee 12 days after the mortgage was entered in to was upheld. The reason why equity does not strike down such options is that the mortgagor has obtained the loan, thus equity leaves him to make whatever arrangements with the mortgagee he sees fit. As he is not in a weaker position for the mortgagee to take advantage.[19]

The principle in Samuel and the line of option cases have been applied by the CA in Jones v Morgan[20] it was held although the mortgage was taken out in 1994 and in 1997 a separate transaction was drawn up to give the mortgagee the right to purchase part of the mortgaged property was held to be void. On the basis that the latter was a renegotiation of the former. Thus could not be regarded as a separate and independent transaction. Angela's pre-emption based on these authorities will be void. The result of the exercise of the pre-emption would be that the mortgagee becomes the owner of the land, as a result this would be inconsistent with the right to redeem.

However as Angela has a pre-emption the courts may take a amore relaxed of flexible approach of equity. This ahs been suggested in obiter of Rosemex Service station[21] . The pre-emption may be deemed to be a separate agreement and only exists during the period of her mortgage. Thus may not be seen as a clog which will exist after redemption of the mortgage, as it will not be enforceable then.

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[18] (1902) AC 461
[19] p479, Riddall, J, G., Land Law, seventh edition, 2003, Suffolk, LexisNexis; Butterworths.
[20] (2001) 28 EC 140 (CS)
[21] (1968)

In conclusion it is submitted that the court will uphold Postponement of the redemption provision. Since the courts rarely intervene in commercial transactions unless Angela can show it to be of Unconscionable behaviour by Skin Deep ltd. The second provision which prevents Angela from buying beauty products from any other supplier may be held void, as it would probably be declared by the courts as being a restraint on trade. The interest rate of 8% above the normal rate may be valid given Angela's previous record of problems with paying loans, thus this can be seen as security. The separate agreement in relation to the sale of the shop would almost certainly be declared void by equity on the authority of Sammuel v Jarrah Timber. However as Angela has a pre-emption the courts may use a different approach.

Hence Angela may find it difficult to free the shop lease from all the provisions mentioned. Thus may find it difficult to sell the shop lease to Touch Tone ltd.