

## Freedom to sell Residential Property

A mortgage's right to sell a property where there is a default without a court order. It will come as a relief to lenders that, at the end of last year, the High Court confirmed that a lender can, if the circumstances permit, choose to sell a property by exercising an express power of sale and that a court order is not required to utilise such a power. In so doing, the court held that Article 1 of the Convention for the Protection of Human Rights does not apply to the exercise of an express power of sale. In *Horsham Properties Group v Clarke and Another*, the court upheld an action for possession by the successor in title of the lender on a residential property against the original owners who had charged it to the lender as security for a loan.

Following mortgage arrears, the lender appointed receivers over the property who sold it to a third party, the third party in turn transferring it to the claimant who was registered as the owner at the Land Registry. The claimant subsequently issued proceedings for possession on the basis that the continued occupation of the property by the original owners represented a trespass. The original owners argued that Article 1 of the Convention required lenders to apply to the court for an order for possession or sale.

The court considered whether the original owner's rights (as borrowers) under the Convention were infringed by permitting the lender to overreach the borrower's rights without obtaining a court order for possession or sale. It was concluded that the lender and borrower had reached a private bargain and that it was not for the court to seek to interfere in this. Consequently, it was decided that the respondents' human rights had not been infringed.

The judgment reignites a long-standing debate as to whether lenders who charge residential property should be entitled to repossess that property without a court order. The Government is said to be concerned about this issue and has said "*Jack Straw has asked for advice on the implications of this judgment and will consider with colleagues across government whether further action is needed to protect homeowners*". It is of course the case that most lenders will not manage to sell a property with the defaulting owners still in occupation and so, in practice, they are likely to apply for a possession order.

For more information please contact:

**Peter Nicholson**  
Solicitor  
020 8394 6412  
Peter.Nicholson@russell-cooke.co.uk

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