

Property Litigation column: Whose right is it anyway? Recent developments in the ‘special’ agency of LPA receivers

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Articles | [Published on 10-Dec-2019](#)

Evie Barden, a barrister at Enterprise Chambers, reviews the recent decision in *Menon v Pask [2019] EWHC 2611 (Ch)* and considers whether LPA receivers can obtain possession of residential property, in their own name, against individual owner-occupier mortgagors and, if so, whether the court has the power to delay, suspend or stay possession.

Can you get possession against a mortgagor-occupier as an LPA receiver? If the court can give you possession, does it have the power to postpone possession under section 36 of the Administration of Justice Act 1970 (AJA 1970)?

These were the questions which vexed the courts in *Menon v Pask [2019] EWHC 2611 (Ch)*. Mr Justice Mann gave judgment on the appeal from HHJ Dight in this matter on 7 October 2019.

Mr and Mrs Menon were the legal owners of 43 Porchester Terrace, London. They had granted a bank a charge, securing the liabilities of Silky Way Investments Ltd. The charge provided the bank with the power to appoint a receiver. Under the charge, the receiver had the power to take possession and generally manage the property, and to sell it. The charge stated that "any receiver appointed hereunder shall so far as the law allows be deemed to be agent of the Mortgagor and Borrower for all purposes".

The borrower defaulted and demand was made of the Menons. Receivers were then appointed under the Law of Property Act 1925 and the charge. By their appointment, the receivers were delegated with "all powers on the part of the Lender and/or the Receivers referred to in the Legal Charge".

The receivers then commenced proceedings against the Menons to obtain possession. The claim was commenced by Silky Way Investments Ltd, acting by its receivers. Realising this was an error, an amendment was made, substituting the names of the Menons for Silky Way. The action, somewhat strangely, was then the Menons, acting by the receivers, suing the Menons.

Shortly before trial, the mortgagors sought to amend their defence to take the point that the receivers did not have a right to make a claim for possession and in order to rely on section 36 of the AJA 1970.

Permission was refused by HHJ Dight on the basis that those defences would not give the Menons an arguable defence. First, he held that the mortgagors' own rights to deal with the property had been postponed to the rights they had conferred effectively on the receivers as their deemed agents. Second, he held that, as the receivers did not derive title from the mortgagee, and as section 36 of the AJA 1970 only operated when a mortgagee or a person deriving title from the mortgagee was seeking possession, section 36 of the AJA 1970 did not apply and he had no statutory or other discretion to postpone the possession order in order to allow time for payment. HHJ Dight, therefore, granted possession in favour of the LPA receivers of the property.

Mr Justice Mann granted permission to appeal but required the parties to deal with the form of the proceedings. The receivers applied to substitute themselves for the Menons.

There were no prior reported authorities which addressed the first question raised on the appeal. Mr Justice Mann noted that it was not immediately obvious how receivers might themselves have a right to possession against the mortgagor; given the nature of receivership, unless the mortgagee's right to possession had been delegated to the receivers, they were not exercising the mortgagee's rights. Further, he noted that it was not easy to see conceptually how the mortgagors' right to possession could be turned against the mortgagors themselves.

Mr Justice Mann held that, notwithstanding those difficulties, the receivers had a separate right to possession against the mortgagor, because of the special nature of the agency relationship. At paragraph 27, he stated that:

"...The receivers have power to demand that possession be given up, and if it is not given up then the receivers must have power to take proceedings, and those proceedings would have to be in their own names. That seems to me to be the only solution which makes business sense. Insofar as it is inconsistent with normal concepts of agency, then that is because the agency of the receivers is not a normal agency, for all the reasons appearing above. The receivers clearly have the right to retain possession as against the mortgagors were they to go into possession and be sued by the mortgagors. That demonstrates that they have a better right of possession than do the mortgagors (if they insist on it), and it is consistent with that they be able to claim possession as against mortgagors in possession and, if necessary, sue..."

The court then went onto to consider the application of section 36 of the AJA 1970 and whether it had any discretion to postpone the date for possession. Mr Justice Mann held that receivers fell within the statutory meaning of mortgagee in the AJA 1970. He accepted that it was true that "in a traditional sense" the receivers did not derive title from the mortgagee or even have title. But, he stated, the court had to consider the nature and source of their rights, how they come to be appointed and what their fundamental purpose is. He stated that, while technically agents of the mortgagor, receivers are appointed by the mortgagee so that the property can be best managed in the interests of the mortgagee; their agency is not a genuine agency, but a device to restrict the mortgagee's liability. In terms of enforcement, the receivers essentially stand in the shoes of the mortgagee for the mortgagee's benefit. Mr Justice Mann's view was that it did not reflect reality to treat the receivers as agents of the mortgagor and that it was, therefore, not an improper strain on the language in the AJA 1970 to say that they derived title from the mortgagee; "title" meant their right to possession.

Most commonly, receivers are not appointed to sell properties where the mortgagor is merely in occupation, so the situation in *Menon v Pask* is unlikely to face receivers frequently. Where it does, there is a cautionary tale for them: be careful to bring the claim in their own names and not the name of the mortgagors, otherwise the claim cannot succeed.

More generally, it is difficult to understand how Mr Justice Mann found that the "title" for the purposes of section 39 of the AJA 1970 was derived from the mortgagee when he had already held that the right to possession is one which arises from the special nature of the receiver's agency. Nonetheless, the court's decision in *Menon v Pask* suggests the courts' willingness to find ways around the concept of the receiver as agent for the mortgagor in order to provide practical solutions and to not allow banks to hide behind receivers.

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