

Rules of the High Court (Amendment) Rules 2008

The Rules of the High Court (Cap. 4A)

Order 88 – MORTGAGE ACTIONS

Remarks:

Adaptation amendments retroactively made – see 25 of 1998 s. 2

Remarks

1. Application and interpretation (O. 88, r. 1)

(1) This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action (other than an action to which rule 5A applies) in which there is a claim for any of the following reliefs, namely –

- (a) payment of moneys secured by the mortgage,
- (b) sale of the mortgaged property,
- (c) foreclosure,
- (d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property,
- (e) redemption,
- (f) reconveyance of the property or its release from the security,
- (g) delivery of possession by the mortgagee.

(2) In this Order “mortgage” (按揭) includes a legal and an equitable mortgage and a legal and an equitable charge, and references to a mortgagor, a mortgagee and mortgaged property shall be construed accordingly.

(3) An action to which this Order applies is referred to in this Order as a mortgage action.

(4) These rules apply to mortgage actions subject to the following provisions of this Order.

4. Claim for possession: failure by a defendant to acknowledge service (O. 88, r. 4)

(1) Where in a mortgage action begun by originating summons, being an action in which the plaintiff is the mortgagee and claims delivery of possession or payment of moneys secured by the mortgage or both, any defendant fails to acknowledge service of the originating summons, the following provisions of this rule shall apply, and references in those provisions to the defendant shall be construed as references to any such defendant.

This rule shall not be taken as affecting Order 28, rule 3, or rule 5(2), in so far as it requires any document to be served on, or notice given to, a defendant who has acknowledged service of the originating summons in the action.

(2) Not less than 4 clear days before the day fixed for the first hearing of the originating summons the plaintiff must serve on the defendant a notice of appointment for the hearing and a copy of the affidavit in support of the summons.

(3) Where the plaintiff claims delivery of possession there must be indorsed on the outside fold of the copy of the affidavit served on the defendant a notice informing the defendant that the plaintiff intends at the hearing to apply for an order to the defendant to deliver up to the plaintiff possession of the mortgaged property and for such other relief (if any) claimed by the originating summons as the plaintiff intends to apply for at the hearing.

(4) Where the hearing is adjourned, then, subject to any directions given by the Court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the defendant not less than 2 clear days before the day fixed for the hearing.

A copy of any affidavit served under this paragraph must be indorsed in accordance with paragraph (3).

(5) Service under paragraph (2) or (4), and the manner in which it was effected, may be proved by a certificate signed by the plaintiff, if he sues in person, and otherwise by his solicitor.

The certificate may be indorsed on the affidavit in support of the summons or, as the case may be, on any further affidavit intended to be used at an adjourned hearing.

(6) A copy of any exhibit to an affidavit need not accompany the copy of the affidavit served under paragraph (2) or (4).

(7) Where the plaintiff gives notice to the defendant under Order 3, rule 6, of his intention to proceed, service of the notice, and the manner in which it was effected, may be proved by a certificate signed as mentioned in paragraph (5).

5. Action for possession or payment: evidence (O. 88, r. 5)

(1) The affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule.

This rule applies to a mortgage action begun by originating summons in which the plaintiff is the mortgagee and claims delivery of possession or payment of moneys secured by the mortgage or both.

- (2) The affidavit must exhibit a true copy of the mortgage and the original mortgage must be produced at the hearing of the summons.
- (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and except where the Court in any case or class of case otherwise directs, the state of the account between the mortgagor and mortgagee with particulars of –
 - (a) the amount of the advance,
 - (b) the amount of the periodic payments required to be made,
 - (c) the amount of any interest or instalments in arrear at the date of the originating summons and at the date of the affidavit, and
 - (d) the amount remaining due under the mortgage.
- (4) Where the plaintiff claims delivery of possession, the affidavit must give particulars of every person who to the best of the plaintiff's knowledge is in possession of the mortgaged property.
- (5) If the mortgage creates a tenancy other than a tenancy at will between the mortgagor and mortgagee, the affidavit must show how and when the tenancy was determined and if by service of notice when the notice was duly served.
- (6) Where the plaintiff claims payment of moneys secured by the mortgage, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).
- (7) Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.

5A. Action for the enforcement of charging order by sale (O. 88, r. 5A)

- (1) This rule applies to a mortgage action to enforce a charging order by sale of the property charged.
- (2) The affidavit in support of the originating summons must –
 - (a) identify the charging sought to be enforced and the subject-matter of the charge;
 - (b) specify the amount in respect of which the charge was imposed and the balance outstanding at the date of the affidavit;
 - (c) verify, so far as is known, the debtor's title to the property charged;
 - (d) identify any other incumbrances on the property charged stating, so far as is known, the names and addresses of the incumbrancers and the amounts owing to them;
 - (e) set out the plaintiff's proposals as to the manner of sale of the property charged together with estimates of the gross price which

would be obtained on a sale in that manner and of the costs of such sale;

- (f) where the property charged consists of land in respect of which the plaintiff claims delivery of possession, give particulars of every person who to the best of the plaintiff's knowledge is in possession of the property charged or any part of it.

6. Action by writ: judgment in default (O. 88, r. 6)

(1) Notwithstanding anything in Order 13 or Order 19, in a mortgage action begun by writ judgment on failure to give notice of intention to defend or in default of defence shall not be entered except with the leave of the Court.

(2) An application for the grant of leave under this rule must be made by summons and the summons must, notwithstanding anything in Order 65, rule 9, be served on the defendant.

(3) Where a summons for leave under this rule is issued, rule 4(2) to (7) shall apply in relation to the action subject to the modification that for references therein to the originating summons, and for the reference in paragraph (2) to the notice of appointment, there shall be substituted references to the summons.

(4) Where a summons for leave under this rule is issued in an action to which rule 5 would apply had the action been begun by originating summons, the affidavit in support of the summons must contain the information required by that rule.

7. Foreclosure in redemption action (O. 88, r. 7)

Where foreclosure has taken place by reason of the failure of the plaintiff in a mortgage action for redemption to redeem, the defendant in whose favour the foreclosure has taken place may apply by ~~motion or~~ summons for an order for delivery to him of possession of the mortgaged property, and the Court may make such order thereon as it thinks fit.

(Enacted 1988)

Rule 61
Rec 14