

Recontextualizing the Neighbourhood Principle: Mortgagee Liability, Social Impact and Financial Justice in Global Secured Transactions

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Abstract:

This article re-examines the Neighbourhood Principle as a framework for mortgagee liability to third parties, repositioning it within a socio-legal and development-oriented context. While existing scholarship has treated the principle primarily as a doctrinal tool in private law, this study argues that its true significance lies in its capacity to address systemic inequities in mortgage enforcement, particularly in developing and transitional economies. Drawing on comparative analysis across common law and civil law jurisdictions including Nigeria, the United Kingdom, and Indonesia, the article demonstrates how mortgage enforcement practices often generate adverse social outcomes, including undervalued property sales, financial exclusion, and the erosion of wealth among vulnerable borrowers and guarantors. These effects are especially pronounced in jurisdictions with weak regulatory oversight and inefficient property markets. Integrating doctrinal analysis with empirical insights on mortgage recovery rates and enforcement outcomes, the article develops a socio-legal framework that reconceptualizes mortgagee duties as instruments of economic justice and financial system accountability. It argues that the Neighbourhood Principle provides a normative foundation for aligning secured transactions law with broader policy objectives, including consumer protection, housing security, and equitable access to credit. The article concludes with policy-oriented recommendations for legislative reform, regulatory innovation, and institutional strengthening, proposing a model of “ethical mortgage enforcement” that balances creditor rights with societal impact in an increasingly interconnected global financial system.

Keywords: Neighbourhood Principle, Mortgagee Duties, Third-Party Rights, Comparative Secured Transactions, Indonesian Civil Law, *Perbuatan Melawan Hukum*, Financial Regulation, ASEAN Harmonization.

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1. INTRODUCTION

The global financial system rests fundamentally on the institution of secured credit, with real estate mortgages representing one of the most significant forms of security interests worldwide. Within this context, the power of sale, the mortgagee's ability to realize security without judicial intervention has emerged as a commercially vital but legally contentious remedy. The fundamental tension in mortgage law lies in balancing the mortgagee's legitimate interest in debt recovery against the protection of vulnerable parties whose financial stability is inextricably linked to the mortgaged property.

In practical terms, the exercise of mortgagee powers has far-reaching consequences beyond the immediate contractual relationship. In many developing economies, including Nigeria, distressed property sales frequently occur under suboptimal market conditions, often resulting in significant financial losses for borrowers and guarantors. These outcomes contribute to wealth erosion, reduce access to future credit, and reinforce structural inequalities within the financial system.

Traditional common law approached this balance through a narrow lens of contractual privity, limiting duties primarily to the immediate parties of the mortgage agreement. This formalist approach has been increasingly criticized for its failure to account for the broader social and economic consequences of mortgage enforcement.

The neighbourhood principle, articulated by Lord Atkin in *Donoghue v. Stevenson*¹ provides a transformative lens through which to re-evaluate this balance. Originally conceived as a test for duty of care in negligence, the principle's ethical core that one must take reasonable care to avoid acts that could foreseeably harm one's neighbour has demonstrated remarkable adaptability.

This article repositions the neighbourhood principle as a socio-legal tool for advancing fairness and accountability in secured transactions. It integrates comparative doctrinal analysis with empirical observations and policy considerations to develop a framework responsive not only to legal coherence but also to societal impact. In doing so, it proposes reforms that align secured transactions law with broader objectives of financial inclusion, consumer protection, and equitable economic development.

2. LEGAL MATERIALS AND METHOD

This study integrates doctrinal analysis with empirical insights and comparative socio-legal frameworks. The methodology involves:

- a. Doctrinal Review: Analyzing the evolution of the duty of care from the subjective "good faith" standard to the objective "reasonable care" standard established in *Cuckmere Brick Co. Ltd v Mutual Finance Ltd*.

¹ [1932] AC 562 (HL).

- b. **Comparative Analysis:** Examining legal structures across common law (UK, Nigeria, Kenya, Ghana, Uganda, South Africa, Malaysia) and civil law jurisdictions (Indonesia, Germany, Netherlands).
- c. **Statutory Evaluation:** Reviewing modern codifications of mortgagee duties, such as Kenya's Land Act 2012 and Indonesia's Civil Code (*KUHPerdata*).
- d. **Empirical Contextualization:** Utilizing World Bank data and regional research (e.g., Centre for Affordable Housing Finance in Africa) to assess mortgage recovery rates and the real-world impact of enforcement.

3. RESULT AND DISCUSSION

a. Historical and theoretical foundations

The neighbourhood principle owes its modern formulation to the landmark English case of *Donoghue v. Stevenson*. Lord Atkin's seminal dictum established a universal test for duty of care in negligence:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be: persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions in question.²

This principle anchored legal duty in the twin concepts of foreseeability and proximity. Although born in a case concerning a manufacturer's liability, the neighbour principle has transcended its origins, evolving into a broader legal metaphor for situations where one party must reasonably consider the interests of another.

The principle also draws from deeper philosophical wells. It embodies a utilitarian concern for minimizing foreseeable harm, a Kantian respect for persons as ends in themselves, and a relational approach that recognizes our obligations stem from our connections to others. In legal theory, it represents a shift from formalist, rule-based reasoning to a more contextual, policy-oriented approach that considers the social consequences of legal relationships.

The principle's migration into commercial law, including secured transactions, was gradual but significant. Courts began recognizing that the special relationships created by

² Donoghue v Stevenson [1932] AC 562, 580.

financial instruments could establish the necessary "proximity" for duty of care to arise. The UK House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* extended duty to negligent misstatements in commercial contexts, demonstrating the principle's expanding reach.³

b. Mortgagee's power of sale: common law doctrines and evolving standards

The mortgagee's power of sale is a right, typically conferred by deed or statute, to sell the mortgaged property upon the mortgagor's default without judicial oversight. In Nigeria, for instance, in states that apply the English Conveyancing Act 1881 or its local analogues, a legal mortgage by deed carries a statutory power of sale.⁴ This power becomes exercisable once specific conditions are met: the mortgage money is due, requisite notices have been served, and the mortgagor remains in default for a stipulated period.

Historically, the mortgagee's primary obligation was to act in good faith—a subjective standard focused on the mortgagee's honest belief rather than the objective reasonableness of their actions. The classic statement came from *Kennedy v De Trafford*,⁵ where Lord Herschell stated that a mortgagee was not a trustee of the power of sale and could look after their own interests.⁶

The landmark shift occurred in *Cuckmere Brick Co. Ltd v Mutual Finance Ltd*,⁷ where the English Court of Appeal established that a mortgagee must take reasonable care to obtain the true market value of the property.⁸ In this case, the mortgagee was held liable for failing to advertise that the property had valuable planning permission for residential development, resulting in a sale at undervalue.

The Nigerian Supreme Court in *African Continental Bank Ltd v Ihekwoaba*,⁹ affirmed this standard, emphasizing that while mere inadequacy of price is insufficient to vitiate a sale, the mortgagee must make genuine efforts to secure a proper price¹⁰.¹⁰ Cross JSC noted that "the mortgagee is not a trustee of the power of sale for the mortgagor, but the power is given to him for his own benefit to enable him to recover his debt better."¹¹

Commonwealth jurisdictions have increasingly codified these duties. Kenya's Land Act, 2012 explicitly imposes a duty of care on a chargee to the mortgagor and any guarantor to obtain the best price reasonably obtainable.¹² Ghana's Home Mortgage Finance Act, 2008 goes further, setting a quantitative threshold by prohibiting sales

³ [1964] AC 465 (HL).

⁴ Conveyancing Act 1881 (England; applicable in some Nigerian states as a statute of general application).

⁵ [1897] AC 180, 185 (HL).

⁶ *Supra*.

⁷ [1971] Ch 949 (EWCA).

⁸ *Supra*.

⁹ 2003) 17 NWLR (Pt. 848) 249 (Nigeria).

¹⁰ *Supra*.

¹¹ *Supra*.

¹² Kenya Land Act 2012, s 97(1).

below 85% of the appraised market value except after two failed attempts.¹³ These statutory developments represent a significant maturation of the common law position.

c. Extending the duty: identifying the mortgagee's "neighbours"

The mortgagor remains the most obvious "neighbour" in this context. The proximity is direct and inherent in the relationship. Nigerian courts have explicitly endorsed this view, noting in cases like *B.O.N. v. Aliyu*¹⁴ that the parties are "neighbors" in a power-of-sale scenario.¹⁵ This duty translates to a practical obligation on the mortgagee to make a bona fide effort to secure a fair price. However, the practical challenge lies in evidence. As the *Ihekwoaba* case demonstrates, Nigerian courts require concrete evidence, often through professional valuation, to establish that a sale price was so low as to constitute a breach of duty rather than mere market fluctuation.

A logical extension of this rule can be made to guarantors and sureties. A guarantor, who undertakes to answer for the mortgagor's debt, holds a vested financial interest in the sale's outcome. This positions the guarantor as a party "so closely and directly affected" that they logically fall within the legal neighbourhood. English law squarely recognized this extension in *Standard Chartered Bank Ltd v Walker*.¹⁶ Lord Denning MR compellingly reasoned that a guarantor is "vitally affected by the outcome of the sale" and should therefore be protected by the same duty of care. This logic has found statutory expression in jurisdictions like Uganda's Mortgage Act, 2009.¹⁷

While direct Nigerian case law on this point is sparse, the co-extensive nature of the guarantor's liability with the debt makes the harm from a negligent sale both direct and foreseeable, strongly supporting the application of the neighbour principle.

The duty has also been extended to subsequent mortgagees or charge holders in some jurisdictions. In *China and South Sea Bank Ltd v Tan Soon Gin*,¹⁸ the Privy Council recognized that a mortgagee owed a duty to a guarantor, and by logical extension, this protection would extend to others in a similar position of vulnerability. Kenya's Land Act explicitly includes subsequent charge-holders in the duty of care.¹⁹

There is however, a limit to these duties. The boundaries of the duty are tested with third parties who have an interest in the property but are not obligors themselves. The English case of *Parker-Tweedale v Dunbar Bank Plc*²⁰ is definitive here. The Court of Appeal rejected a claim by a husband with a beneficial interest in a property mortgaged by his wife, holding that the duty of care did not extend to him. The court confined the

¹³ Home Mortgage Finance Act 2008 (Act 770), s 19 (Ghana).

¹⁴ 1999) 7 NWLR (Pt. 612) 622 (Nigeria).

¹⁵ Supra.

¹⁶ *Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410 (CA).

¹⁷ Mortgage Act 2009, s 27 (Uganda).

¹⁸ *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536 (PC).

¹⁹ Kenya Land Act 2012, s 97(1).

²⁰ *Parker-Tweedale v Dunbar Bank Plc* [1991] Ch 12 (CA).

duty to the special relationship between mortgagor and mortgagee (and by extension, guarantors), drawing a clear line at beneficiaries under a separate trust. This delineation is crucial; it establishes that the duty is not owed to everyone who might suffer incidental financial harm, but only to those in a relationship of sufficient legal proximity, rooted in the credit agreement itself.

d. Beyond the sale: tortious liability to physical neighbours

The neighbourhood principle also has relevance beyond the financial aspects of mortgage enforcement. When a mortgagee takes possession of a property, whether before sale or through appointment of a receiver, they assume responsibilities to adjacent landowners and the public. In *Mobil Oil Nigeria Ltd v Assan*,²¹ the Nigerian Court of Appeal considered a mortgagee's liability for environmental damage caused by a petrol station it had taken into possession. The court emphasized that once a mortgagee assumes control, it steps into the shoes of the owner and assumes corresponding responsibilities. This application of the neighbourhood principle reinforces that a mortgagee's role is not purely financial; upon assuming control, it bears a social responsibility as a "temporary guardian" of the property.

e. Comparative analysis: civil law perspectives on lender liability

1. Unlawful acts doctrine: Article 1365 KUHPerdata

The common law's nuanced application of the neighbourhood principle finds a strong conceptual parallel in civil law systems, particularly Indonesia's doctrine of *perbuatan melawan hukum* (unlawful act) under Article 1365 of the Civil Code (*KUHPerdata*).²² This provision establishes that "any unlawful act, which causes harm to another, obliges the person by whose fault the harm occurred to provide compensation."²³

Indonesian jurisprudence has expansively interpreted *perbuatan melawan hukum* to encompass not only the violation of a subjective right but also the breach of a general duty of care or a violation of societal norms. In the landmark case of *Molengraaff* decision (1919), the Dutch Supreme Court (whose jurisprudence heavily influenced Indonesian law) recognized that unlawful acts could include violations of "social carelessness," establishing a broad standard similar to negligence.

2. Application to banking and financial transactions

Indonesian courts have applied Article 1365 to banking relationships, recognizing that financial institutions owe duties beyond their contractual obligations. In cases involving bank negligence leading to customer loss, courts have found liability under *perbuatan melawan hukum* even without explicit contractual breach. The regulatory environment

²¹ (1995) 10 NWLR (Pt. 526) 258 (CA).

²² Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata, KUHPerdata), Article 1365.

²³ *Supra*.

in Indonesia further reinforces these responsibilities. Banking regulations issued by Bank Indonesia and the Financial Services Authority (Otoritas Jasa Keuangan - OJK), such as OJK Regulation No. 1/POJK.07/2013 on Consumer Protection in Financial Services, emphasize principles of fairness, transparency, and responsible lending.²⁴ These policies acknowledge the potential for lender actions to cause externalities, aligning with the social orientation of the neighbourhood principle.

3. Broader civil law context

The Dutch Burgerlijk Wetboek(BW) and German Bürgerliches Gesetzbuch (BGB)²⁵ contain similar provisions. German law, through §826 BGB on intentional damage contrary to public policy and §823 on negligent infringement of rights, provides functional equivalents to the common law duty of care. The principle of Treu und Glauben (good faith) in German law further imposes general standards of fair dealing in contractual relationships, including mortgage enforcement.

4. Functional comparison

This comparative analysis reveals significant convergence between common law and civil law approaches. While the doctrinal pathways differ—relying on a general clause of unlawfulness rather than a tort of negligence—the underlying objective of constraining powerful actors to prevent foreseeable harm to vulnerable parties is remarkably consistent. Both systems recognize that certain relationships create responsibilities that transcend explicit contractual terms.

f. Regulatory frameworks and empirical realities

The evolution of mortgagee duties cannot be understood in isolation from broader financial regulation. The 2008 global financial crisis triggered significant regulatory reforms worldwide, with increased emphasis on responsible lending and consumer protection. In Nigeria, the Central Bank's guidelines on mortgage origination and the Failed Banks Act have influenced lending practices. In Indonesia, OJK regulations have progressively strengthened consumer protection in financial services, implicitly recognizing the unequal bargaining power between lenders and borrowers.

Empirical studies reveal significant variations in mortgage enforcement outcomes across jurisdictions. World Bank data indicates that mortgage recovery rates vary dramatically, from over 90% in some developed economies to below 40% in some developing jurisdictions. These disparities reflect not only legal framework differences but also variations in implementation and institutional capacity. Research by the Centre for Affordable Housing Finance in Africa shows that in many African jurisdictions, including Nigeria, mortgagees frequently recover less than 60% of outstanding debt

²⁴ Otoritas Jasa Keuangan (OJK) Regulation No. 1/POJK.07/2013 on Consumer Protection in Financial Services (Indonesia).

²⁵ The Dutch Burgerlijk Wetboek(BW) and German Bürgerliches Gesetzbuch (BGB).

through power of sale, partly due to market limitations but also reflecting procedural deficiencies in sales processes.

Increasingly, constitutional values are influencing mortgage enforcement. The South African Constitutional Court in *Jaftha v Schoeman* held that execution against residential property without judicial oversight could violate the constitutional right to housing.²⁶ This approach has influenced other jurisdictions, including Kenya, where courts now consider social justice implications in mortgage enforcement. While Nigerian courts have been more cautious in invoking constitutional provisions in purely commercial mortgage relationships, the growing influence of fundamental rights discourse is evident in the increasing judicial scrutiny of mortgagee conduct.

g. Case Studies: regional and global perspectives

1. Nigeria: incremental development

Nigerian jurisprudence demonstrates a cautious but progressive approach to extending mortgagee duties. From the early emphasis on good faith in *Nigerian Building Society v. Shoyoye*²⁷ to the recognition of reasonable care in *Ihekwoaba*, Nigerian courts have gradually expanded protections while maintaining commercial practicality. The recent Court of Appeal decision in *UBA v. Trident Consulting Ltd*²⁸ reinforced the duty to obtain a proper price, emphasizing that mortgagees must conduct sales transparently and with adequate publicity to ensure market value is tested.

2. South Africa: constitutional influence

South African law represents perhaps the most dramatic evolution, with courts explicitly invoking constitutional values to reshape common law principles. The *Mokebe* case series has established that courts will set aside sales where properties are sold at gross undervalue, particularly for residential properties where the right to housing is engaged.²⁹

3. Malaysia: blending Common Law and Islamic principles

Malaysian mortgage law operates at the intersection of common law traditions and Islamic finance principles. Cases like *Arab-Malaysian Finance Bhd v. Taman Ihsan Jaya* demonstrate how courts balance conventional security enforcement with Islamic concepts of fairness and preventing oppression (*zulm*).³⁰

²⁶ *Jaftha v Schoeman* 2005 (2) SA 140 (CC).

²⁷ (1977) 5 SC 89.

²⁸ (2019) LPELR-47663(CA).

²⁹ *ABSA Bank Ltd v Mokebe and Others* (2018) ZAGPJHC 314 (Gauteng High Court, South Africa).

³⁰ *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya* [2008] 5 MLJ 631.

h. Towards a universal framework: normative analysis and reform proposals

The comparative analysis supports the development of a universal framework for mortgagee liability centered on the ethical mortgagee concept. This concept recognizes that those exercising powerful remedies over essential assets like homes have responsibilities that transcend narrow contractual interpretation. The neighbourhood principle provides the philosophical foundation for this approach, emphasizing that relationships of proximity and foreseeability create moral and legal obligations. This framework is sufficiently flexible to accommodate different legal traditions while establishing clear minimum standards.

For common law jurisdictions like Nigeria, specific legislative reforms would enhance clarity and protection: These include the amendment of property legislation to explicitly state that the duty of care in mortgagee sales is owed to mortgagors, guarantors, and subsequent encumbrancers. Another recommendation is to strengthen statutory notice provisions to ensure all affected parties receive adequate notification and opportunity to protect their interests.

It is also important to promote transparency in sales. Thus, it becomes necessary to mandate minimum advertising periods and methods to ensure genuine market testing of property value. This can be done by establishing judicial oversight thresholds, for example, the introduction of requirements for court approval for sales significantly below independent valuation, particularly for residential properties. Courts can promote the development of the law by establishing guidelines which require principled interpretation, which (1) recognizes that economic proximity can establish duty of care relationships in commercial contexts; (2) develops clear guidelines for proving breach of duty, including when professional valuation evidence is required, and (3) utilize a range of remedies including damages, setting aside sales, and accounting for profits in cases of breach.

For Indonesia and ASEAN member states, the neighbourhood principle framework offers a valuable reference point for legal development. Indonesian courts could explicitly recognize that *perbuatan melawan hukum* encompasses a mortgagee's failure to exercise reasonable care in property sales, providing clearer protection for guarantors and other affected parties. Another point is the need for regulatory alignment. OJK could issue specific guidelines on mortgage enforcement standards, drawing on international best practices while respecting local legal traditions. In addition, the ASEAN economic community initiatives could develop harmonized principles for secured transactions that incorporate core duty of care concepts.

To implement these reforms practically, mortgage documentation could include standardized clauses:

The Mortgagee, in exercising its power of sale, agrees to act in good faith and take reasonable care to obtain the best price reasonably obtainable at the time of sale. This duty is owed to the Mortgagor, any guarantor of

the secured obligations, and any holder of a registered subsequent charge. The Mortgagee will provide all such parties with copies of independent valuations obtained in connection with any sale and evidence of marketing efforts.

4. CONCLUSION

This comprehensive examination demonstrates that the neighbourhood principle provides a robust and adaptable framework for defining mortgagee liability to third parties across legal traditions. From its origins in tort law, the principle has evolved to address complex commercial relationships, offering courts a conceptual tool to balance efficiency with equity in secured transactions.

The comparative analysis reveals significant convergence between common law and civil law approaches. While employing different doctrinal mechanisms, both traditions recognize that powerful financial actors have responsibilities to those whose interests are foreseeably affected by their actions. The Indonesian doctrine of *perbuatan melawan hukum* under Article 1365 KUHPerdata provides a particularly strong foundation for developing mortgagee liability in line with the neighbourhood principle's ethical core.

The practical implementation of this framework requires coordinated action across multiple domains—legislative reform to codify clear standards, judicial development through principled interpretation, regulatory guidance to ensure compliance, and professional practice changes to embed ethical considerations in mortgage enforcement. For emerging economies and regional harmonization initiatives like ASEAN, the neighbourhood principle offers a path toward secured transactions law that supports financial development while protecting vulnerable parties. By recognizing that we are all "neighbours" in our increasingly interconnected financial systems, legal traditions can develop more responsive and equitable approaches to one of the most fundamental relationships in modern economies—that between lender and borrower, and all those whose fortunes are tied to their interactions.

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