

HLPA Mortgage Possession Procedural Issues



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SLP LAW SCHOOL

Procedure

Pre-Action Protocol

CPR Part 55



Administration of
Justice Acts

Costs and Legal Aid

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Pre-Action Protocol for
Possession Claims
based on Mortgage or
Home Purchase Plan
Arrears in Respect of
Residential Property

Aims

- ensure that a lender and a borrower act fairly and reasonably with each other in resolving any matter concerning mortgage or home purchase plan arrears;
- encourage greater pre-action contact between the lender and the borrower in order to seek agreement between the parties, and where agreement cannot be reached, to enable efficient use of the court's time and resources; and
- encourage lenders to check who is in occupation of the property before issuing proceedings.



2017 LAM 1000000 1000000

Provision of Information

- regulatory information sheet or National Homelessness Advice Service/Shelter/Cymru booklet on mortgage arrears;
- information on the current monthly instalments and the amounts paid for the last 2 years; and
- information on the amount of arrears
- authorised tenant?
- advice to make contact with the Council's housing department
- refer the borrower to independent debt advice



2017 LAM 1000000 1000000

- Parties/Representatives must take all reasonable steps to discuss with each other the reasons for the arrears, the borrower's financial circumstances and proposals for repayment of the arrears (5.5).
- Reasonable request to change date or method of payment
- Respond promptly to any proposal for payment made by the borrower (5.6).
- Borrower must be given reasonable time to consider lenders proposals (5.7).
- If the borrower fails to comply with an agreement, the lender should warn the borrower, by giving the borrower 15 business days notice in writing, of its intention to start a possession claim unless the borrower remedies the breach in the agreement (5.8).



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Postponing the start of a claim

- Submitted a claim to the DWP for SMI or UC; or
- submitted a claim under a payment protection policy; or
- homelessness prevention support provided by the LA, and has provided all the evidence required to process a claim;
- Reasonable expectation of eligibility from the DWP or an insurer or support from the LA or welfare or charitable organisation; or
- ability to pay not covered by the DWP or the insurer; or
- financial difficulty, requires time to seek debt advice and reasonable expectation of an improvement in financial circumstances in the foreseeable future



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If a borrower can demonstrate that reasonable steps have been or will be taken to market the property at an appropriate price in accordance with reasonable professional advice, the lender must consider postponing starting a possession claim to allow the borrower a realistic period of time to sell the property. The borrower must continue to take all reasonable steps actively to market the property where the lender has agreed to postpone starting a possession claim.



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Possession claim is a last resort

- And must not normally be started unless all other reasonable attempts to resolve the situation have failed. The parties should consider whether it is reasonable and appropriate to do one or more of the following—
- (a) extend the term of the mortgage;
- (b) change the type of mortgage;
- (c) defer payment of interest due under the mortgage;
- (d) capitalise the arrears.



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SVF LMS

Non-compliance

- The court may order that:
- the parties are relieved of the obligation to comply or further comply with the pre-action protocol or this Practice Direction;
- the proceedings are stayed while particular steps are taken to comply with the pre-action protocol or this Practice Direction;
- sanctions are to be applied.



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N123 Pre Action Protocol checklist - PD55 para 5.5

Compliance with protocol requirements

Rejected a payment proposal from the borrower?

dates of the times in the previous three months that it has tried to contact the borrower

Why possession proceedings are continuing if aware claim pending for SMI or UC or mortgage payment protection

If the borrower has indicated the property will be sold, why the lender is pursuing possession



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CPR Requirements: CPR Part 55 and PD

Land Registry Searches

- Not jointly registered in name of husband & wife? - lender must carry out a Land Registry search (Form MH3) to check for any notice or caution;
- Unregistered land? - lender must do a search at the Land Charges Department to see if a Class F land charge has been registered.
- Any rights must be set out in the PoC.
- Search result must be attached to the pleading or exhibited to a witness statement.



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- PoC will also need to be served on the protected spouse (s56(2) of the Family Law Act 1996 Act and CPR PD 55.4 para 2.5).
- 15 working days from the date of the MH3 search to issue proceedings.
- The non-owning spouse may apply to the court to be made a party before the action is 'finally disposed of in the court'.
- Court can refuse to make him or her a party if it is not satisfied that the non-owning spouse can satisfy the borrower's liabilities and obligations (s55 FLA 1996).



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Notice to Occupier & LA

Within 5 days of receiving notification of the date of the hearing, C must send notices to

- the property, addressed to "the tenant or the occupier";
- the housing department of the LA within which the property is located; and
- any registered proprietor (other than the claimant) of a registered charge over the property

C must produce at the hearing a copy of the notices and evidence that they have been sent.



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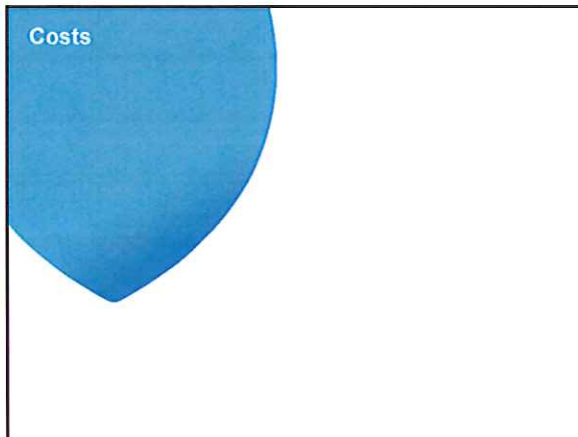
Particulars of Claim

- Prescribed form (N120 for mortgage possession cases) and attached to the Claim Form: CPR 55(4).
- Must set out the details of the mortgage
- Schedule showing dates and amounts of all payments due and payments made under the mortgage agreement or mortgage deed for a period of two years immediately preceding the date of issue, or if the first date of default occurred less than two years before the date of issue, from the first date of default and a running total of the arrears
- N.B. note the requirements when issuing using PCOL



5th LAW SCHOOL 5th May

Costs



- The lender has a contractual right to costs - usually a right to add the costs to the security.
- This applies even where there is a LA cert.
- Lenders will not normally ask for a costs order.
- The Court will only assess costs when:
 - Asked to do so by lender; or
 - It determines that they have not been reasonably incurred or are unreasonable in amount



5th LAW SCHOOL 5th May

Green v Southern Pacific Mortgage Ltd

[2018] EWCA Civ 854

- When the proceedings began on 26 March 2009, Miss Green had borrowed £96,000 and was in arrears of £4,445.62. Nine years later, in addition to her original debt, Southern Pacific claim £269,000 for their legal costs, and having had the benefit of legal aid, Miss Green has a debt of £50,000 in that respect, which will in principle be subject to the statutory charge. The equity in her property, which stood at about £90,000 when the mortgage began, has been obliterated.



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The scale of the costs: Costs have been added to the debt at the average rate of around £2000 every month. [92]

Lack of costs control: There is no primary mechanism, short of a costs order, for controlling this costs expenditure. There is no statutory equivalent to s.20C of the Landlord and Tenant Act 1985 ... [93]

Costs responsibility: The Recorder, while making certain findings against Miss Green, was scathing about the conduct of Southern Pacific. [94]

As per Lord Justice Peter Jackson



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Gomba Holding (UK) v Minorities Finance (No 2)

[1992] 3 WLR 723, CA

- an order for costs is always discretionary;
- contractual right to costs = discretion should ordinarily be exercised to reflect that right;
- a mortgagee is not to be deprived of a contractual or equitable right to add costs to the security by reason of a costs order that has been made without reference to the mortgagee's contractual or equitable rights and without any adjudication as to whether or not the mortgagee should be deprived of those costs.

Therefore the Court may order assessment of disputed costs – CPR 44.5 and PD 44.7.2.



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'be not at liberty to add any costs to the security'

Seek such an Order where:

- Lender has acted unreasonably in bringing proceedings or some aspect of proceedings; or
- Breach of pre-action protocol; or
- Adjudgment granted due to lenders error.

A borrower can also ask for detailed assessment under s70 Solicitors Act 1974 or by application in the proceedings or by Part 8 claim for an account of sums due under the mortgage.



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Legal Aid



Legal Aid

- Legal Aid is available in mortgage possession proceedings as a Debt matter.
- Applications must be made through The Gateway (online or by phone: 0845 3454345)
- Subject to the means test
- Subject to the Statutory Charge, which may defer subject to a registered charge on the home, with interest charged at 8%.
- See: <https://legalaidhandbook.com/laspo-resources/>



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South East

MCOB and the Ombudsman

MCOB

- If the mortgage is an Regulated Mortgage Contract (RMC) then the Financial Conduct Authority (FCA) Mortgage Conduct Of Business (MCOB) handbook applies.
- Breach of the MCOB rules does not make a loan or loan term unenforceable; it leaves the lender open to regulatory action by the FCA.



What is an RMC?

A Regulated Mortgage Contract (RMC) is borrowing

- Secured by a first mortgage; and
- Entered into on/after 31 October 2004; and
- Where at least 40% of the premises will be occupied by the borrower, specified relatives of the borrower or beneficiaries under a trust of which the borrower is trustee

Reg 61 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 544/2001



MCOB and Charges: Ch 12

- The lender must have disclosed charges to the customer in a transparent way before the loan was taken out. In addition:
- Any charge for arrears cannot be more than a reasonable estimate of the cost of the additional administration required.
- There should be no charge for arrears on a customer who is adhering to an arrangement for repayment
- A blanket scale of charges is permitted.



MP L&L 12/03/2015 Book 140

MCOB and Arrears and Repossessions: Ch 13

Lenders:

- must pay due regard to customer's interests and treat them fairly.
- must have written policies and procedures; however the lender is not obliged by the MCOB rules to give a copy to the borrower.
- should repossess only when all other reasonable attempts to resolve the situation have failed
- consider a range of suggested options borrowers in arrears
- are expected to keep adequate records; provide adequate ongoing information to borrowers in arrears; and take certain steps before issuing proceedings
- must issue quarterly statements of any charges arising due to arrears on the account, even if there is an agreement about repayment of the arrears which is being kept to.
- must not put pressure on borrowers in default by the method or timing of contact



MP L&L 12/03/2015 Book 140

MCOB and Sale after Repossession: Ch 13

- Whenever a property is repossessed (whether voluntarily or through legal action) steps are taken to:
- market the property for sale as soon as possible; and
- obtain the best price that might reasonably be paid, taking account of factors such as market conditions as well as the continuing increase in the amount owed by the customer under the regulated mortgage contract.



MP L&L 12/03/2015 Book 140

- A balance has to be struck between the need to sell the property as soon as possible, to reduce or remove the outstanding debt, and other factors which may prompt the delay of the sale. These might include market conditions (explicitly referred to in MCOB 13.6.1) but there may be other legitimate reasons for deferring action. This could include the expiry of a period when a grant is repayable on re-sale, or the discovery of a title defect that needs to be remedied if the optimal selling price is to be achieved.
- If the lender seeks to recover any shortfall then the borrower must be notified within 6 years of the date of sale.



MPF LMS 1000000 10/10/10

Complaints to the Ombudsman

- Must have lenders final response or 8 weeks have passed since complaint was made;
- Must be made within 6 months of lenders final response or 6 years of issue complained of or (if later) 3 years after complainant became aware or should have been aware of issue, subject to a discretion to consider complaints outside these time limits;
- Complain online, on form from website or by phone: 0800 023 4567;
- Test applied is what is 'fair and reasonable in all the circumstances of the case'.



MPF LMS 1000000 10/10/10

Potential Outcomes

- Money award;
- Interest award;
- Costs award;
- Direction that the lender takes such steps in relation to the complaint as the Ombudsman considers just and appropriate.

The website has a page aimed at advice workers



MPF LMS 1000000 10/10/10

- Over half of complaints are resolved within three months. But some disputes can take longer.
- Pre-action protocol 8.1: The lender must consider whether to postpone the start of a possession claim where the borrower has made a genuine complaint to the Financial Ombudsman Service about the potential possession claim



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Derbyshire Homeloans Ltd v Keany

(2007) Bristol County Court January 2007 Legal Action April 2007 p 28

- D was self employed, his business failed and the mortgage account went into substantial arrears. There was still some equity in the property and the defendant had written to the claimant with proposals to sell the property in June 2006 and then again in December 2006 but the claimant had failed to respond. In view of the claimant's failure to respond to the defendant's proposals, the Deputy District Judge stayed the proceedings specifically to allow the defendant to pursue correspondence with the FCA, and, if appropriate, a complaint to the Ombudsman.
- Possession proceedings were stayed, on terms, for two months, under CPR 26.4(2)(b).
- C obtained permission to appeal on the grounds that the CPR should not be used to override the lender's right to possession but the case was settled before the appeal was heard.



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Administration of Justice Acts 1970 and 1973

Administration of Justice Acts 1970

S36(1)

- "Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession
- the court may exercise any of [its] powers if it appears to the court that
- the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage....or remedy any default"



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Courts Powers

The powers that are referred to are the powers to

- adjourn the proceedings;
- stay or suspend the possession order;
- or postpone the date for delivery of possession, for such period as the court thinks reasonable, at any time before execution of a possession order i.e. including warrant suspension



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Section 8(2) AJA 1973 clarifies the power in s36

- "A Court shall not exercise...the powers conferred by s36...unless it appears to the Court not only that the mortgagor is likely to be able within a reasonable period to pay any amounts regarded as due on account of the principal sum secured, together with the interest on those amounts, but also that he is likely to be able by the end of that period to pay any further amounts that he would have expected to be required to pay by then on account of that sum and of interest on it."



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What are the 'sums due'?

- Where repayment is deferred the sums due are the normal instalments.
- Any term on the mortgage agreement that makes the whole balance of the loan due in the event of default by the borrower, s8(1) AJA 1973 allows the Court to ignore it.



VILLIERS SCHOOL

Sum 1a

What is a reasonable period?

Cheltenham and Gloucester Building Society v Norgan
[1996] 1WLR 343

- When assessing the reasonable period the court should take as its starting point the full term of the mortgage and pose the question:
- Would it be possible to for the borrower to maintain payment-off of the arrears by instalments over that period?



VILLIERS SCHOOL

Sum 1a

Relevant considerations

- How much can a borrower reasonably afford to pay, both now and in the future?
- If the borrower has a temporary difficulty in meeting his obligations, how long is the difficulty going to last?
- What was the reason for the arrears?
- How much remains of the original term?
- What are the relevant contractual terms, what type of mortgage is it, e.g. when is the principal due to be repaid?
- Is it a case where the court should exercise its power to disregard accelerated payments (s.8 of the 1973 Act)?



VILLIERS SCHOOL

Sum 1a

- Is it reasonable to expect the lender, in the circumstances of the particular case, to recoup the arrears of interest (1) over the whole of the original term, or (2) within a shorter period or (3) within a longer period, e.g. by extending the repayment period? Is it reasonable to expect the lender to capitalise interest or not?
- Are there any reasons affecting the security which should influence the length of the period for payment?



Example

- Repayment Mortgage start date 1/3/10
- Sum borrowed £300,000.
- Term 25 years
- Instalments £1,422 pcm
- Arrears £9,110
- Work out remaining term = 16 years 8 months, so 200 months.
- Divide arrears by months remaining ($£9,110 \div 200 = £45.55$)
- Can the Defendant pay $£1,422 + £45.55 = £1467.55$?



After expiry of the term of the mortgage

- The Court retains its s36 AJA powers despite the mortgage term expiring: *LBI HF v Stanford and Another* [2015] EWHC 3131 (Ch)



Evidence

- Equity – estate agents valuation or Zoopla search
- Proof of income
- Statement of income and expenditure
- Any evidence of the temporary difficulty coming to an end (e.g. debt counselling, new sources of income, including lodgers, promotion at work)
- What can the Defendant afford to pay?

[illegible]



Justice

Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property

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I INTRODUCTION

Definitions

1.1 In this Protocol—

(a) 'possession claim' means a claim for the recovery of possession of property under Part 55 of the Civil Procedure Rules 1998;

(b) 'home purchase plan' means a method of purchasing a property by way of a sale and lease arrangement that does not require the payment of interest;

(c) 'bank holiday' means a bank holiday under the Banking and Financial Dealings Act 1971;

(d) 'business day' means any day except Saturday, Sunday, a bank holiday, Good Friday or Christmas day; and

(e) 'authorised tenant' means a tenant whose tenancy is authorised as between the borrower and the lender.

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Preamble

2.1 This Protocol describes the behaviour the court will normally expect of the parties prior to the start of a possession claim within the scope of paragraph 3.1 below.

2.2 This Protocol does not alter the parties' rights and obligations.

2.3 It is in the interests of the parties that mortgage payments or payments under home purchase plans are made promptly and that difficulties are resolved wherever possible without court proceedings. However in some cases an order for possession may be in the interest of both the lender and the borrower.

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Aims

3.1 The aims of this Protocol are to—

(a) ensure that a lender or home purchase plan provider (in this Protocol collectively referred to as 'the lender') and a borrower or home purchase plan customer (in this Protocol collectively referred to as 'the borrower') act fairly and reasonably with each other in resolving any matter concerning mortgage or home purchase plan arrears;

(b) encourage greater pre-action contact between the lender and the borrower in order to seek agreement between the parties, and where agreement cannot be reached, to enable efficient use of the court's time and resources; and

(c) encourage lenders to check who is in occupation of the property before issuing proceedings.

3.2 Where either party is required to communicate and provide information to the other, reasonable steps should be taken to do so in a way that is clear, fair and not misleading. If the lender is aware that the borrower may have difficulties in reading or understanding the information provided, the lender should take reasonable steps to ensure that information is communicated in a way that the borrower can understand.

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Scope

4.1 This Protocol applies to arrears on—

(a) first charge residential mortgages and home purchase plans regulated by the Financial Conduct Authority under the Financial Services and Markets Act 2000 (as amended by the Financial Services Act, 2012);

(b) second charge mortgages over residential property and other secured loans regulated under the Consumer Credit Act 1974 on residential property; and

(c) unregulated residential mortgages.

4.2 Where a potential claim includes a money claim and a possession claim, this protocol applies to both.

4.3 The protocol does not apply to Buy To Let mortgages.

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II ACTIONS PRIOR TO THE START OF A POSSESSION CLAIM

Initial contact and provision of information

5.1 Where a borrower falls into arrears, the lender must provide the borrower with—

- (a) where appropriate, the required regulatory information sheet or the National Homelessness Advice Service/Shelter/Cymru booklet on mortgage arrears;
- (b) information on the current monthly instalments and the amounts paid for the last 2 years; and
- (c) information on the amount of arrears, which should include—
 - (i) the total amount of the arrears;
 - (ii) the total outstanding of the mortgage or the home purchase plan; and
 - (iii) whether interest or charges have been or will be added, and, where appropriate, details or an estimate of the interest or charges that may be payable.

5.2 The lender should also seek information about whether the property is occupied by an authorised tenant.

5.3 The lender must advise the borrower to make early contact with the housing department of the borrower's Local Authority and, should, where relevant refer the borrower to appropriate sources of independent debt advice.

5.4 The parties, or their representatives, must take all reasonable steps to discuss with each other the reasons for the arrears, the borrower's financial circumstances and proposals for repayment of the arrears (see paragraph 7.1). For example, parties should consider whether the reasons for the arrears are temporary or long-term, and whether the borrower may be able to pay the arrears in a reasonable time.

5.5 The lender must consider a reasonable request from the borrower to change the date of regular payment (within the same payment period) or the method by which payment is made. The lender must either agree to such a request or, where it refuses such a request, it must, within a reasonable period of time, give the borrower a written explanation of its reasons for the refusal.

5.6 The lender must respond promptly to any proposal for payment made by the borrower. If the lender does not agree to such a proposal it should give reasons in writing to the borrower within 10 business days of the proposal.

5.7 If the lender submits a proposal for payment, the borrower must be given a reasonable period of time in which to consider such proposals. The lender must set out the proposal in sufficient detail to enable the borrower to understand the implications of the proposal.

5.8 If the borrower fails to comply with an agreement, the lender should warn the borrower, by giving the borrower 15 business days notice in writing, of its intention to start a possession claim unless the borrower remedies the breach in the agreement.

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Postponing the start of a possession claim

6.1 A lender must not consider starting a possession claim for mortgage arrears where the borrower can demonstrate to the lender that the borrower has—

- (a) submitted a claim to—

(i) the Department for Works and Pensions ('DWP') for Support for Mortgage Interest (SMI) or if appropriate Universal Credit; or

(ii) an insurer under a mortgage payment protection policy; or

(iii) a participating local authority for support under a Mortgage Rescue Scheme, or other means of homelessness prevention support provided by the local authority,

(iv) and has provided all the evidence required to process a claim;

(b) a reasonable expectation of eligibility for payment from the DWP or from an insurer or support from the local authority or welfare or charitable organisation such as the Veterans Welfare Scheme or Royal British Legion;

(c) an ability to pay a mortgage instalment not covered by a claim to the DWP or the insurer in relation to a claim under paragraph 6.1(1)(a) or (b);

(d) difficulty in respect of affordability or another specific personal or financial difficulty, and requires time to seek free independent debt advice, or has a confirmed appointment with a debt adviser and

(e) a reasonable expectation, providing evidence where possible, of an improvement in their financial circumstances in the foreseeable future (for example a new job or increased income from a lodger).

6.2 If a borrower can demonstrate that reasonable steps have been or will be taken to market the property at an appropriate price in accordance with reasonable professional advice, the lender must consider postponing starting a possession claim to allow the borrower a realistic period of time to sell the property. The borrower must continue to take all reasonable steps actively to market the property where the lender has agreed to postpone starting a possession claim.

6.3 Where, notwithstanding paragraphs 6.1 and 6.2, the lender has agreed to postpone starting a possession claim, the borrower should provide the lender with a copy of the particulars of sale, the Energy Performance Certificate ('EPC') or proof that an EPC has been commissioned and (where relevant) details of purchase offers received within a reasonable period of time specified by the lender. The borrower should give the lender details of the estate agent and the conveyancer instructed to deal with the sale. The borrower should also authorise the estate agent and the conveyancer to communicate with the lender about the progress of the sale and the borrower's conduct during the process.

6.4 Where the lender decides not to postpone the start of a possession claim, it must inform the borrower of the reasons for this decision at least 5 business days before starting proceedings.

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Further matters to consider before starting a possession claim

7.1 Starting a possession claim should be a last resort and must not normally be started unless all other reasonable attempts to resolve the situation have failed. The parties should consider whether, given the individual circumstances of the borrower and the form of the agreement, it is reasonable and appropriate to do one or more of the following–

(a) extend the term of the mortgage;

(b) change the type of mortgage;

(c) defer payment of interest due under the mortgage;

(d) capitalise the arrears; or

(e) make use of any Government forbearance initiatives in which the lender chooses to participate.

7.2 Where there is an authorised tenant in occupation of the property, at the possession hearing the court will consider whether—

(a) further directions are required;

(b) to adjourn the possession claim until possession has been recovered against the tenant; or

(c) to make an order conditional upon the tenant's right of occupation.

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Complaints to the Financial Services Ombudsman

8.1 The lender must consider whether to postpone the start of a possession claim where the borrower has made a genuine complaint to the Financial Ombudsman Service ('FOS') about the potential possession claim.

8.2 Where a lender does not intend to await the decision of the FOS, it must give notice to the borrower, with reasons, that it intends to start a possession claim.

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Mortgage Possession Procedure Checklist

Has the lender:

1.	Completed Land Registry searches	
2.	Produced up to date office copies at Court	
3.	Notified anyone with a matrimonial home right about the proceedings	
4.	Notified anyone else who has a relevant interest about the proceedings	
5.	Complied with PD55 in relation to arrears schedule	
6.	Served notice on the occupier	
7.	Served notice on the Local Authority	
8.	Complied with the CPR in relation to proof of service of notice to the occupier/Local Authority	
9.	Complied with the Pre Action Protocol	
10.	Completed the N123 checklist and produced two copies at Court	

Calculating the *Norgan* figure

Calculate the term remaining in months

Divide the arrears by the number of months remaining

Work out what the Defendant can afford to pay

If more than the Current Monthly Instalment and the *Norgan* figure then likely to be reasonable.

If less, is the financial difficulty temporary?

