

Defending Mortgage Re-Possessions Training for HLPAs

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TOOL KIT-

1. i) these notes ; (ii) at the outset I would emphasize the importance of getting some written valuation of the security if possible; (iii) pre-action protocol (iv) any law society guidance (v) Part 5 of 8th edition of Defending Possession Proceedings¹ written by Derek McConnell and his annual LAG review of the legal developments affecting owner occupiers & last but not least (vi) adequate instructions regarding
 - (a) background circumstances surrounding the decision to obtain the mortgage, application, offer , terms and conditions , district land registry office copy entry for the property AND the ratio of the value of the loan to the value of property
 - (b) what type of mortgage is it and when is the principal due to be repaid and how much remains of the original term?
 - (c) the current monthly instalments (the “cml”) contractually due , and the amount of the arrears
 - (d) How much can the borrower reasonably afford to pay, both now and in the future?

¹ Published by Legal Action Group (LAG)

(e) What was the reason for the arrears which have accumulated?

(f) If the borrower has a temporary difficulty in meeting his obligations, how long is the difficulty likely to last?

Essential background –

2. Points to be aware of

- (i) A mortgage is a disposition of property as security for a debt, previously done by demise, nowadays most often by mortgage deed effecting a charge against a registered interest for securing money, the security being redeemable on repayment or discharge of the debt. For the purposes of the Law of Property Act 1925, 'mortgage' includes any charge or lien on any property for securing money or money's worth: s 205(1)(xvi). According to the FCA a regulated mortgage contract is a contract which, at the time it is entered into, satisfies the following conditions:(1) the contract is one where a lender provides credit to an individual or trustees (the 'borrower');(2) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land in the EEA; and (3) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling.
- (ii) Everyone who relies on a building society or bank loan to enable completion on a house or a flat purchase acquires not the premises, but a right to get the property back from the lender, subject to the terms of the mortgage, after repayment of all sums owing, free from the mortgage. In equity, the borrower is regarded as the owner but in law the lender may go into possession “before the ink is dry on the mortgage” **unless** , and this is the essential point to grasp, **there is something in the mortgage agreement or in statute** whereby the lender is, upon certain conditions being met, denied that right.
- (iii) A lender will take subject to interests that are protected at time of registration , which include-by virtue of paragraph 2 of Schedule 3 of the Land Registration Act 2002 -

persons who were in actual occupation at the date of completion of the purchase (overriding interests and prior tenancies) *William Glyn's Bank v Boland* [1981] AC 487 & *Barclays Bank plc v Zarovabli* [1997] 2 WLR 729. The Law Commission report that lay behind the LRA 2002 stated "on registration a registered chargee will only take subject to a prior charge if it is either a registered charge or the subject of a notice on the register. If, for example, (1) A contracts to lend money to B on the security of a charge over B's registered land and protects that estate contract by the entry of a notice on the register. (2) B then charges the land to C, who registers his charge. (3) pursuant to the earlier contract, B executes the charge in favour of A, which is completed by registration, A's registered charge takes priority over C's even though C's was registered before A's. A's charge gives effect to a contract that was binding on C."

- (iv) A mortgage, like other transactions, is vulnerable to fraud or may be set aside on account of undue influence, misrepresentation or because in all the circumstances a transfer was unconscionable. In *Mortgage Express v Lambert* [2017] Ch. 93 Lewison LJ said this :- It is, I think, clear enough that a right to set aside a transaction on the ground of misrepresentation or undue influence is classified in English law as "an equity" or a "mere equity": *Bristol and West Building Society v Mothew* [1998] Ch 1, 22 (misrepresentation); *Bainbrigge v Browne* (1881) 18 Ch D 188 (undue influence) and *Abigail v Lapin* [1934] AC 491, 505 (fraud). In *Mid-Glamorgan County Council v Ogwr Borough Council* (1993) 68 P & CR 1, 9 Hoffmann LJ referred in general terms to a "right to have the deed set aside" as a "mere equity". There is no reason to suppose that the right to set aside an unconscionable bargain is any different". The leading cases on undue influence are *Barclays Bank v O'Brien* [1994] 1 AC 189 @195; and *Royal Bank of Scotland v Etridge* [2002] 2 AC 773. The main issues in such cases are whether or not there was (i) undue influence (or misrepresentation); (ii) notice; (iii) failure to take reasonable steps. The operative principles may be explained thus:-

- Save for certain categories of relationship where undue influence is presumed without more a presumption of undue influence arises where the person seeking to set the disposition aside (A) proves that he or she was subject to influence by the party seeking to uphold the disposition (B) or by those acting for B , and that the disposition itself is of a kind or is on terms that call for explanation by B (that is to say, it is not explained by the ordinary motives that would lead someone in those circumstances to enter into such a transaction).
- Where the presumption applies, the onus rests on B to show that there was in fact no undue influence on A that led to the disposition. A relationship of influence is often established by proving that A reposes trust and confidence in B , either generally or in relation to the subject-matter of the transaction, but a relationship of influence does not depend on proof that A reposed trust and confidence in B. It may arise where, e.g., there is a position of dependency and vulnerability of A as compared with domination or control of B: see *Etridge* , at [11], per Lord Nicholls of Birkenhead.
- A lender was placed on enquiry whenever one party to a cohabiting couple offered to stand surety for the debts of the other party, if the bank knew about the relationship.
- Where a wife became surety for the debts of a company in which she held shares with her husband, the bank was similarly placed on enquiry, even in circumstances where the wife was a director or company secretary;
- A bank is required to insist that a wife attend a private meeting in order that it might explain the nature of the risk and urge her to seek independent advice.

- In order to ensure that a wife had been provided with independent advice , and in order to take reasonable steps to satisfy itself that the practical consequences of the proposed transaction had been clearly explained, the Bank should communicate directly with the wife/ partner / gay partner regarding the nature of the advice that she/he was to receive and ensure that the confirmation required by the bank from the person's nominated solicitor was fully explained to her/him.
- (v) On occasions your client may have lived in a property for ages , and claim a beneficial interest even though not the registered proprietor. In respect of sole name cases your client would have to show that it was intended that she/he should have a beneficial interest, which depends on the Court being able to deduce objectively from conduct- not impute irrespective of intentions- supporting the agreement arrangement or understanding she/he relies on. It is a process of drawing inferences from conduct verbal or otherwise. The recent leading cases both concerned the respective percentages of beneficial interest in jointly owned properties hence in Thomson v Humphrey [2009] EWHC 3576 (Ch) Warren J held:-

“25....The present case, unlike Stack v Dowden, is one where the property, ..., is vested in one person, the defendant, and where another person, the claimant, claims an interest. Nonetheless, it is clear that the starting point is that the beneficial ownership in a case of sole ownership rests with the sole owner. A person in the situation of the claimant who seeks to establish an interest as against the holder of the legal title has a dual hurdle. She must show that it was intended that she should have some share, and must then establish the extent of that share. Much of what was said in the opinions of Stack v Dowden, as well as

by the Court of Appeal in *Oxley v Hiscock* [2005] Fam 211, is directed at the second question.

26 .In relation to the first question, it is necessary to go back to *Lloyds Bank v Rosset* [1991] 1 AC 107².

- (vi) If some of the money lent pursuant to an unenforceable mortgage, is used to pay off a previous secured lender, then taking the benefit of that previous security is a process called subrogation. This is a restitutionary remedy to reverse unjust enrichment. The lender may rely on subrogation in an alternative case before the trial judge in respect of the same property, but the remedies can only attach to that remaining part of the beneficial interest held by the perpetrator of the fraud or undue influence.
- (vii) Where a successful *Barclays Bank v O'Brien* undue influence defence is upheld the lender may still apply under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 for an order for sale. For an example see *First National Bank v Achampong* [2003] 2 P. & C.R. DG11. That was a case where Judge Coughlin in the Shoreditch County Court had dismissed the bank's claim for possession in respect of a charge where the signature of the wife appears to have been procured by undue influence. The question arose in the Court of Appeal as to whether an order for sale should be made in respect of the husband's share and the Court of Appeal made the order, observing in paragraph 65 in the judgment of Blackburne J that it was plain that an order for sale should be made. The most significant consideration to his mind was that the bank would be kept waiting indefinitely for any payment in respect of what was, for all practical purposes, its own share of the property. He did take into account the various interests of infant grandchildren in occupation but did not consider that the evidence went far enough to

² In *Stack v Dowden* @ 25, Lord Walker JSC observed that the House of Lords in *Rosset*, “*was unanimously, if unostentiously, agreeing that a “common intention” trust could be inferred even when there was no evidence of an actual agreement*”

deflect him from that conclusion, observing: “It is for the person who resists an order for sale in reliance on section 15(1)(c)³ to adduce the relevant evidence.”

- (viii) One might be forgiven for expecting the Court to find that a fraudulent transfer supporting a subsequent conviction under the Fraud Act 2006 would automatically lead to rectification (being restored as proprietor and having a 3rd party’s charge removed), and indemnity. Not so. That is because of the curious meaning given to mistake for the purposes of the provisions; which distinguish a void from a voidable transaction. According to Schedule 4 of the LRA 2002 :- (1) The court may make an order for alteration of the register for the purpose of— (a) correcting a mistake, (b) bringing the register up to date, or (c) giving effect to any estate, right or interest excepted from the effect of registration. Under Schedule 8 the right to an indemnity is limited to where there has been a mistake. A classic example illustrating the point is the case of *In Argyle Building Society v Hammond* (1984) 49 P & CR 148. The registered freehold proprietor of a property in London, Mr Steed, lived abroad, and his mother held a power of attorney. His sister and her husband, Mr and Mrs Hammond, had the register altered to show themselves as the freehold proprietors. It was Mr Steed's primary case that they had forged the mother's signature on the transfer documents. A building society mortgage was charged on the property and duly entered on the charges register. Mr and Mrs Hammond subsequently defaulted on the payment of the mortgage, and the building society sought possession. At trial Mr Steed abandoned the allegation that his mother's signature on the transfer had been forged by Mr and Mrs Hammond but argued instead that she had been tricked into signing it. Knox J found that that was the case, but he rejected a case of non est factum, with the result that he found the transfer to be voidable but not void. On that basis he ordered the rectification of the proprietorship register to reinstate Mr Steed in place of Mr and Mrs Hammond; but he declined to order rectification of the charges register so as to

³ Trust of Land and Appointment of Trustees Act 1996

remove the building society's charge. See also *MacLeod and others v Gold Harp Properties Ltd and others* [2015] 1 WLR 249; and the required reading on the subject which is the case of *Swift 1st Limited v Land Registry* [2015] Ch 602. In *NRAMLtd v Evans* [2017] EWCA Civ 1013 the point is made that an entry made in the register of an interest acquired under a void disposition should not have been made, and the registrar would not have made it had the true facts been known. By contrast, a change made to the register to reflect a transaction which were merely voidable was correct at the time it was made.

- (ix) The lender is entitled to costs according to the terms of the mortgage or charge, without any Court order to that effect. See TM's paper. Therefore if an interim application is decided in the borrower's favour an order should be sought debarring the Claimant from adding any costs to the security (occasioned by the Defendant's application). See also *Co-operative Bank Plc v Phillips* [2014] 5 Costs L.R. 830 where a mortgagee had discontinued possession proceedings and had got absolutely nothing from them, its costs, and the costs it had made itself liable to pay the mortgagor, had not been reasonably incurred. It was therefore not entitled, under its power to recover costs under the mortgage, to recover **either set of costs** from the mortgagor.
- (x) According to section 126 of the Consumer Credit Act 1974 as amended in 2014, a court order is required to enforce a land mortgage, which includes a regulated mortgage contract and both 1st and 2nd mortgages are now administered by the FCA as regulated mortgage contracts. This contradicts the position as explained in the 1988 decision of *Ropaigealach v Barclays Bank Plc* [2000] Q.B. 263, as adopted by the Supreme Court in the McDonald case. It would be open to a borrower to seek an injunction to restrain enforcement on the strength of section 126(1). It is also relevant that a borrower in occupation is protected by the Criminal Law Act 1977 s.6 .

- (xi) Article 8 applies to the Court's discretion under CPR 73.10 in relation to enforcement of a charging order, see the Eric Bowes case of Close Invoice Finance Ltd v Pile [2008] EWHC 1580 (Ch); [2009] 1 F.L.R. 873; [2008] B.P.I.R. 1465; [2009] Fam. Law 204, where an order was delayed to allow the daughter to complete A levels. Article 8 rights and therefore best interests of the child under Article 3 of the UNCRC may also be engaged in a case where the Court has a discretion under TOLATA⁴; but , see the McDonald case and Legal Action bulletin from April 2017 at page 30 , Article 8 is not applicable horizontally between private parties such as borrower and lender. "To hold otherwise would involve the Convention effectively being directly enforceable as between private citizens so as to alter their contractual rights and obligations, whereas the purpose of the Convention is, as we have mentioned, to protect citizens from having their rights infringed by the state." [2017] A.C. 273 @ 41.
- (xii) There has been provision in the benefits system to support owner occupier claimant's mortgage interest payments since 1948. It is called SMI. Payments since April 2018 of Support for Mortgage Interest will now attach as a charge repayable on eventual sale.

POWERS UNDER ADMINISTRATION OF JUSTICE ACTS 1970 AND 1973 TO ADJOURN, STAY, SUSPEND OR POSTPONE:- see TM's paper .

3. Note that Section 39(1) of the 1970 Act says "mortgagor" and "mortgagee" includes any person deriving title under the original mortgagor or mortgagee". This arguably allows a personal representative, with probate, to apply under s36.

⁴ In Mortgage Corporation v Shaire [2001] Ch 743. MC made an application under the Trusts of Land and Appointment of Trustees Act 1996 s.14 in an action for possession of S's home as a consequence of mortgage arrears. The court considered that the 1996 Act had altered its powers to order a sale in an action for possession by a chargee and that it now had a duty to consider the interests of any children in occupation before making such an order. Neuberger J, as he then was, suspended an order for sale for a period conditional on Mrs Shaire paying interest equivalent to the sum that the lender would have received had the lender been successful in obtaining an outright order for possession and sale.

4. Also note that potentially relevant where a client defaults on an SPO made under s36, is the case of *Lee v Cardiff County Council* [2017] 1 WLR 1751. In this case the Court of Appeal discussed operation of CPR 83.2(3)(e) which states that a warrant must not be issued without permission of the Court "if under the judgment or order, any person is entitled to a remedy subject to the fulfilment of any condition, and it is alleged that the condition has been fulfilled".

THE EQUALITY ACT 2010

5. One part of the House of Lords decision in *Lewisham v Malcolm* 2008 1 AC 1399 that survives and is now generally accepted, is the holding that a claim for possession to which there is otherwise no defence could be defeated where the claim is shown to be discriminatory so as to be rendered unlawful by the EqA, since the courts cannot be required to give legal effect to acts proscribed as unlawful. That is an important point.
6. The question of discrimination should be considered at each stage of proceedings see for example *R (JL) v Secretary of State for Defence* [2013] EWCA Civ 449. The Court of Appeal recently rejected a discrimination defence in *South West Law's case of Southern Pacific Mortgages Ltd v Jacqueline Green* [2018] EWCA Civ 854 , where disability had led to arrears. The Recorder found as a fact that the interest due on the principle sum, payable by the Defendant was lower than the rate met by the DWP. She was therefore entitled to a payment that would meet the interest payment due, and more. Had the mortgage been changed to an interest only mortgage, the Defendant would have been able to meet the interest payments and paid off the arrears over a relatively short period of time. The lender issued proceedings and refused the Defendant's requests to switch to an interest-only mortgage as its policy was not to provide such mortgages to existing repayment mortgagors. The main issue concerned the nature of the service that was being provided and whether that policy made it impossible or unreasonably difficult for disabled persons to make use of the mortgage service or put the

Defendant at a substantial disadvantage. The Court decided that an adjustment from capital repayment to interest only would fundamentally alter the service and the lender had not discriminated unlawfully against the borrower on account of her disability or failed to make a reasonable adjustment for her under s.21(1) of the 1995 Act or s.20 of the 2010 Act. A stay was obtained pending the outcome of an application to the Supreme Court, which has been lodged.

OVERDRAFTS

7. Why do different considerations apply to all monies charges :-

- (i) Where a bank agrees an overdraft arrangement which does not require any earlier repayment until a demand is made and there is no mechanism for deferment or payment by instalments once the demand has been made the Court's powers under ss 36 & 8 don't apply. In *Habib Bank v Tailor* [1982] 1 WLR 1218 the Court held that there could be no section 8 of the Administration of Justice Act 1973 reinterpreted of what sums are due under agreements which did not provide for repayment by instalments.
- (ii) But just because it is an overdraft does not necessarily mean that s36 has no application. There may have been a subsequent agreement for repayment by instalments. In *Rees Inv Ltd v Groves* [2002] 1 P. & C.R. DG9 that was what happened. Neuberger J, as he then was, said this:-

“Where the mortgagor is entitled or permitted to pay the mortgage debt by instalments of deferred payments, this provision (s 8 AJA 1973) allows the court to adjourn proceedings, stay or postpone execution of the other, or postpone the date for delivery of possession. Due to the lender's salvage proposals allowing repayment of the sums due, the debt appeared to fall

within this statutory framework. The claimant argued, however, that the proposals did not have contractual force and were mere indulgences by the claimant's predecessor in title. Neuberger J. agreed, "... that point is strongly arguable, if unattractive ... In order for section 8(1) to apply ... there must be an 'agreement' and to my mind, although it would be appropriate to give that word a wide rather than a narrow meaning, it cannot extend to an arrangement which is not contractually or otherwise legally enforceable." It would, of course, be open for the borrowers to establish some sort of basis for an estoppel. Once an agreement was established, however, it did not matter that it only lasted for an agreed time, "it seems to me that ... what Parliament has specifically done ... is to permit the court to resurrect an instalment arrangement which has failed or concluded as a matter of contract because of the mortgagor's failure to pay." The fact that the nature of the underlying debt was an overdraft, which had not become payable technically until shortly before the proceedings, was also an important consideration. The authorities show that, as a prerequisite of section 8, it is necessary for the sum to become due which entails that a written demand for payment be made. On the present facts, it was the demand itself which made the payment due. Neuberger J. concluded:

"..... Allied had the right simply to call the loan and seek possession. They chose not to do so but instead indulged the defendants in what, was on the fact of it, quite a generous proposal. The proposal was not merely renewed by the claimant, but was relaxed further."

STATUTORY FRAMEWORK

Law of Property Act 1925

87.— Charges by way of legal mortgage.

(1) Where a legal mortgage of land is created by a charge by deed expressed to be by way of legal mortgage, the mortgagee shall have the same protection, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits, or any of them) as if—

(a) where the mortgage is a mortgage of an estate in fee simple, a mortgage term for three thousand years without impeachment of waste had been thereby created in favour of the mortgagee; and

(b) where the mortgage is a mortgage of a term of years absolute, a sub-term less by one day than the term vested in the mortgagor had been thereby created in favour of the mortgagee.

101.— Powers incident to estate or interest of mortgagee.

(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(i) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and

Trusts of Land and Appointment of Trustees Act 1996 c. 47

Part I TRUSTS OF LAND

Powers of court

14.— Applications for order.

(1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section

(2) On an application for an order under this section the court may make any such order—

(a) relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or

(b) declaring the nature or extent of a person's interest in property subject to the trust, as the court thinks fit.

15.— Matters relevant in determining applications.

(1) The matters to which the court is to have regard in determining an application for an order under [section 14](#) include—

(a) the intentions of the person or persons (if any) who created the trust,

(b) the purposes for which the property subject to the trust is held,

- (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
- (d) the interests of any secured creditor of any beneficiary.

Land Registration Act 2002 c. 9
Part 6 REGISTRATION: GENERAL
Registration as proprietor



58 Conclusiveness

(1) If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration.

Land Registration Act 2002 c. 9
Part 12 MISCELLANEOUS AND GENERAL
Miscellaneous

116 Proprietary estoppel and mere equities

It is hereby declared for the avoidance of doubt that, in relation to registered land, each of the following—

- (a) an equity by estoppel, and
- (b) a mere equity,

has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority).

Fraud Act 2006 c. 35
Fraud

2 Fraud by false representation

- (1) A person is in breach of this section if he-
 - (a) dishonestly makes a false representation, and
 - (b) intends, by making the representation-
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A representation is false if-
 - (a) it is untrue or misleading, and

- (b) the person making it knows that it is, or might be, untrue or misleading.
- (3) “Representation” means any representation as to fact or law, including a representation as to the state of mind of-
- (a) the person making the representation, or
- (b) any other person.
- (4) A representation may be express or implied.
- (5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).



4 Fraud by abuse of position

- (1) A person is in breach of this section if he-
- (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
- (b) dishonestly abuses that position, and
- (c) intends, by means of the abuse of that position-
- (i) to make a gain for himself or another, or
- (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

**Consumer Credit Act 1974 c. 39
Part VIII SECURITY
Land mortgages**

16.- exempt agreements

Repealed by Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2013/1881 Pt 5 art.20(5) (April 1, 2014)

**Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order
2013/1881
Part 5 Amendments of the Consumer Credit Act 1974 etc.**

20.— Amendments of the 1974 Act

- (1) The 1974 Act is amended as follows.
- (2) [Part 1 \(sections 1 to 7\)](#) (Office of Fair Trading) ¹ is omitted.
- (3) In [section 8](#) (consumer credit agreements) ², for [subsection \(3\)](#) substitute—
“(3) A consumer credit agreement is a regulated agreement within the meaning of this Act if it is a regulated credit agreement for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order.”.
- (4)
- (5) [Section 16](#) (exempt agreements) ⁴ is omitted
- (38) For [section 126](#) (enforcement of land mortgages) substitute

Consumer Credit Act 1974 c. 39
Part VIII SECURITY
Land mortgages

126. Enforcement of land mortgages.

[

(1) A land mortgage securing an agreement of one the following types is enforceable (so far as is provided in relation to the agreement) on an order of the court only—

- (a) a regulated agreement;
- (b) a regulated mortgage contract;
- (c) a consumer credit agreement which would, but for [article 60D](#) of the Regulated Activities Order (exempt agreements: exemption relating to the purchase of land for non-residential purposes) ², be a regulated agreement.

(2) Subject to [section 140A\(5\)](#) (unfair relationships between creditors and debtors) ³, a regulated mortgage contract which would, but for [article 60C\(2\)](#) of the Regulated Activities Order (exempt agreements: exemption relating to the nature of the agreement), be a regulated agreement is to be treated for the purposes of [Part 9](#) (judicial control) as if it were a regulated agreement.

(3) In this section, “*regulated mortgage contract*” has the meaning given by [article 61\(3\)](#) of the Regulated Activities Order (regulated mortgage contracts)).

Notes

1. Substituted by Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2013/1881 [Pt 5 art.20](#) (March 30, 2014: commenced by an amendment)

2. [Articles 60C and 60D](#) inserted into [S.I. 2001/544](#) by [S.I. 2013/1881](#).

3. Inserted by the [Consumer Credit Act 2006 \(c.14\)](#), [section 19](#); amended by [S.I. 2013/1881](#).

135.— Power to impose conditions, or suspend operation of order.

(1) If it considers it just to do so, the court may in an order made by it in relation to a regulated agreement include provisions—

- (a) making the operation of any term of the order conditional on the doing of specified acts by any party to the proceedings;
- (b) suspending the operation of any term of the order either—
 - (i) until such time as the court subsequently directs, or

(ii) until the occurrence of a specified act or omission.

136. Power to vary agreements and securities.

The court may in an order made by it under this Act include such provision as it considers just for amending any agreement or security in consequence of a term of the order.

USING Pt 9 CCA 1974 to DEFEND A MORTGAGE RE-POSSESSION ACTION.

8. The familiar exemption (which meant that the CCA did not apply) that used to exist in section 16C has gone. Despite this being the case for a number of years it is still not widely accepted.
9. The position is set out in an FCA consultation paper CP14/20- “In fact, although not well understood, time orders will continue to exist... We anticipate that although time orders will continue to apply to both first and second charge lending we will see a marked reduction in their use, as MCOB 13 will require second charge firms to engage with customers much earlier in the process. Therefore consumers should not need to rely on time orders to agree forbearance with the lender”
10. In a March 2015 policy statement regarding implementation of the Mortgage Credit Directive the FCA said this:-

“3.19 Consumer groups asked whether the change in regulation for second charge would impact on whether the courts would still be able to make a Time Order. It appears that there is some confusion among stakeholders as to whether it is currently possible for such orders to be made for first charge loans and a concern that second charge consumers may lose the existing protection.

3.20 As we understand it, the government’s intention has always been to maintain the availability of Time Orders as a judicial tool. We have added a further sentence of explanation to our Perimeter Guidance on the point (see PERG 4.17.2G). The courts are responsible for operating and making decisions in respect of Time Orders and so our guidance cannot address the mechanism for applying for an order.”

11. What seems to have happened is that with a relevant EU directive pending, and with a desire to abolish the Office of Fair Trading the Coalition Government decided to bring control of all secured lending under one roof. The definition of a regulated mortgage contract was expanded to include second mortgages which were thereby brought under the control of the FCA . The process was called alignment. But rather than jettison the Consumer Credit Act controls that applied to certain 2nd mortgages instead, those controls are applied-although only in a limited form -to both 1st and 2nd mortgages.
12. Although this has been the case since April 2014, it still comes as a surprise when it is pointed out that a 1st mortgage is deemed by section 126(2) of the CCA 1974 as amended to be a regulated mortgage contract and that moreover the Court has now far wider powers that it ever did under the Administration of Justice Acts. So think time orders!
13. Therefore if there is nothing else you take from this evening note the significance of the regulated mortgage contract being the key concept and what statutory constraints follow from that. The stealth bomber in all of this is section 136 CCA 1974. This allows the Court to "include such provision as it considers just for amending any agreement or security in consequence of a term of the order".
14. So I'll say it again, a defendant to a mortgage repossession claim, for a mortgage entered into after April 2014, whose mortgage is a regulated mortgage contract may rely on many of the protections contained in Part 9 the Consumer Credit Act 1974. Query if that is true for pre 2004 agreements, so at date of commencement it was not a regulated mortgage contract.
15. The chapter and verse is that Regulation 20 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013/1881 transposes the judicial control part of the Consumer Credit Act into the regulated mortgage contract regime. Section 126(2) of the Consumer Credit Act 1974 set out above, provides that " a regulated mortgage contract which would, but for article 60C(2) of the Regulated Activities Order (exempt agreements: exemption relating to the nature of the agreement), be a regulated agreement **is to be treated for the purposes of Part 9 (judicial control) as if it were a regulated agreement**" ..
16. Part 9 powers of judicial control include under section 129 making a time order under the Consumer Credit Act 1974 as amended, and under section 136 which allows the Court to amend "any agreement or security".

17. Southern & District Finance Plc v Barnes (1995) 27 H.L.R. 691 The Court of appeal decided that the assistant recorder applied section 129 incorrectly in finding that the "sum owed" for the purpose of the time order he was considering could relate only to the unpaid instalments, and he was wrong to conclude that section 136 did not empower him to alter the rate of interest payable on the unpaid instalment; it would have been a proper exercise of discretion, in order to mitigate the impact of the interest charged on unpaid instalments, to reduce the monthly rate of interest from 1.952 per cent to 1 per cent during the period of suspension of the possession order.

18. In the Barnes case, it was further held that

(1) in considering whether to grant a time order the court should consider whether it was just to do so. This involved consideration of all the circumstances of the case including the position of the creditor, as well as the debtor;

(2) when a time order was made it should normally be for a stipulated period and on account of financial difficulty. No time order should be made where the debtor was unlikely to be able to resume payment of at least the contractual instalments. In such cases it would be more equitable to enforce the regulated agreement;

(3) for time orders made in relation to the non payment of money, the "sum owed" meant every sum which was due under the agreement; in the case of possession proceedings it comprised the total indebtedness. The court should consider what instalments would be reasonable both as to amount and timing, having regard to the debtor's means;

(4) a time order could include any amendment of the agreement which the court considered just to both parties and which was a consequence of a term of the order. On amendment of the rate of interest, it was relevant that smaller instalments would result both in a liability to pay interest on accumulated arrears and in an extended period of repayment. The high rate of interest usually payable under regulated agreements to some extent took into account the risk of difficulties in repayment;

(5) where a time order was made and the debtor owed the whole outstanding balance due under the loan, this would have consequences for the term of the loan or the interest rate or both and

(6) if justice required the making of a time order, the court should also suspend any possession order that it had made, for as long as the terms of the time order were complied with.

19. CPR PD 55A 7.1 - CONSUMER CREDIT ACT CLAIMS RELATING TO THE RECOVERY OF LAND “7.1 Any application by the defendant for a time order under section 129 of the Consumer Credit Act 1974 may be made: (1) in his defence; or (2) by application notice in the proceedings”.

20. A topical legal issue ripe for reconsideration, is in relation to the duration of time orders.

21. It might be said that in the context of the longer duration of a mortgage to enable a house purchase, and consistent with Norgan should the Court not be looking at a longer period of repayment, than would otherwise be the case for borrowing to buy a car or double glazing?

22. The labyrinthine nature of the CCA provisions are a huge subject, including notice and disclosure provisions. Application to residential mortgages will have to be worked out.

23. However, the multifactorial assessment required to decide if for want of compliance, the debt is unenforceable would seem to be enough to get past the CPR 55(8) threshold at a first hearing.

24. See for example , where I have added the emphasis to section 127 which provides:-

Consumer Credit Act 1974 c. 39

Part IX JUDICIAL CONTROL

Enforcement of certain regulated agreements and securities

This version in force from: **February 1, 2011** to **present**

◀◀◀(version 3 of 3) ▶▶▶

127.— Enforcement orders in cases of infringement.

(1) In the case of an application for an enforcement order under—

[

(za) [section 55\(2\)](#) (disclosure of information), or

] ¹

[

(zb) [section 61B\(3\)](#) (duty to supply copy of overdraft agreement), or

] ²

(a) [section 65\(1\)](#) (improperly executed agreements), or

(b) [section 105\(7\)\(a\)](#) or (b) (improperly executed security instruments), or

(c) [section 111\(2\)](#) (failure to serve copy of notice on surety), or

(d) [section 124\(1\)](#) or (2) (taking of negotiable instrument in contravention of [section 123](#)),

the court shall dismiss the application if, but [...] ³ only if, it considers it just to do so having regard to—

(i) prejudice caused to any person by the contravention in question, and the degree of culpability for it; and

(ii) the powers conferred on the court by subsection (2) and [sections 135 and 136](#).

(2) If it appears to the court just to do so, it may in an enforcement order reduce or discharge any sum payable by the debtor or hirer, or any surety, so as to compensate him for prejudice suffered as a result of the contravention in question

Consumer Credit Act 1974 c. 39

Part IX JUDICIAL CONTROL

Supplemental provisions as to orders

135.— Power to impose conditions, or suspend operation of order.

(1) If it considers it just to do so, the court may in an order made by it in relation to a regulated agreement include provisions—

(a) making the operation of any term of the order conditional on the doing of specified acts by any party to the proceedings;

(b) suspending the operation of any term of the order either—

(i) until such time as the court subsequently directs, or

(ii) until the occurrence of a specified act or omission.

REGULATORY FRAMEWORK

25. Mortgages and Home Finance: Conduct of Business Sourcebook Chapter 13 issued by the FCA, pursuant to section 137A of the Financial Services & Markets Act 2000 , sets out how firms are to treat mortgage customers in arrears. It adds context to the pre-action protocol.

There is a duty to consider the borrower's point of view and to exhaust forbearance measures before instituting legal proceedings.

Mortgages and Home Finance: Conduct of Business Sourcebook

(“MCOB”)

13.3 Dealing fairly with customers with a payment shortfall: policy and procedures

13.3.1 R (1) A firm must deal fairly with any customer who:

- (a) has a payment shortfall on a regulated mortgage contract or home purchase plan;
- (b) has a sale shortfall; or
- (c) is otherwise in breach of a home purchase plan.

(2) A firm must put in place, and operate in accordance with, a written policy (agreed by its respective governing body) and procedures for complying with (1). Such policy and procedures must reflect the requirements of ■ MCOB 13.3.2A R and ■ MCOB 13.3.4A R.

Vulnerable customers

13.3.1C R A firm must establish and implement clear, effective and appropriate policies and procedures for the fair and appropriate treatment of customers whom the firm understands, or reasonably suspects, to be particularly vulnerable.

(1) Customers who have mental health difficulties or mental capacity limitations may fall into the category of particularly vulnerable customers.

(2) In developing procedures and policies for dealing with customers who may not have the mental capacity to make financial decisions, a firm may wish to have regard to the principles outlined in the Money Advice Liaison Group (MALG) Guidelines "Good Practice Awareness Guidelines for Consumers with Mental Health Problems and Debt".

Customers in payment difficulties: procedures

13.3.2A R A firm must, when dealing with any customer in payment difficulties:

(1) make reasonable efforts to reach an agreement with a customer over the method of repaying any payment shortfall or sale shortfall, in the case of the former having regard to the desirability of agreeing with the customer an alternative to taking possession of the property;

(2) liaise, if the customer makes arrangements for this, with a third party source of advice regarding the payment shortfall or sale shortfall;

(3) allow a reasonable time over which the payment shortfall or sale shortfall should be repaid, having particular regard to the need to establish, where feasible, a payment plan which is practical in terms of the circumstances of the customer;

(4) grant, unless it has good reason not to do so, a customer's request for a change to:

(a) the date on which the payment is due (providing it is within the same payment period); or

(b) the method by which payment is made;

and give the customer a written explanation of its reasons if it refuses the request;

(5) where no reasonable payment arrangement can be made, allow the customer to remain in possession for a reasonable period to effect a sale; and

(6) not repossess the property unless all other reasonable attempts to resolve the position have failed.

13.3.3A R In complying with ■ MCOB 13.3.2A R, a firm must give a customer a reasonable period of time to consider any proposals for dealing with the payment difficulties.

13.3.4A R In complying with ■ MCOB 13.3.2AR(6):

(1) a firm must consider whether, given the individual circumstances of the customer, it is appropriate to do one or more of the following in relation to the regulated mortgage contract or home purchase plan with the agreement of the customer:

(a) extend its term; or

(b) change its type; or

(c) defer payment of interest due on the regulated mortgage contract or of sums due under the home purchase plan (including, in either case, on any sale shortfall); or

(d) treat the payment shortfall as if it was part of the original amount provided (but a firm must not automatically capitalise a payment shortfall where the impact would be material); or

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

(2) a firm must give customers adequate information to understand the implications of any proposed arrangement; one approach may be to provide information on the new terms in line with the annual statement provisions.

Statements of charges

13.5.1 R Where an account is in arrears, and the payment shortfall or sale shortfall is attracting charges, a firm must provide the customer with a regular written statement (at least once a quarter) of the payments due, the actual payment shortfall, the charges incurred and the debt.

MCOB 11

Responsible lending and

and responsible financing of financing home purchase plans

11.6.3 (3) ■ MCOB 11.6.2 R does not apply to a variation to the terms of a regulated mortgage contract or home purchase plan which is made solely for the purposes of forbearance where the customer has a payment shortfall, or in order to avoid a payment shortfall.

The assessment of affordability

11.6.2 R (1) Except as provided in ■ MCOB 11.6.3 R, ■ MCOB 11.6.57 R (Interest roll-up mortgages) and ■ MCOB 11.7 (Transitional arrangements):

(a) before entering into, or agreeing to vary, a regulated mortgage contract or home purchase plan, a firm must assess ...

Monitoring

11.6.22 A firm must put in place, and be able to demonstrate that it has, robust systems and controls (including the use of management information and key performance indicators) to monitor the effectiveness of its affordability assessments, including in preventing payment difficulties.

Interest-only mortgages

11.6.43R ■ MCOB 11.6.41R (1) does not prevent a mortgage lender, when appropriate, from making a temporary concession, by which he accepts payment of interest only, with a customer who is in arrears or has a payment shortfall, or is at risk of arrears or a payment shortfall, on a regulated mortgage contract.

11.6.46 E Acceptance by a mortgage lender of any of the following repayment strategies for the purposes of ■ MCOB 11.6.41R (1) may be relied upon as tending to show contravention of that rule:

(1) an expectation that the value of the property which is the subject of the regulated mortgage contract will increase over its term sufficiently to enable the customer to sell the property to repay the capital borrowed and, where applicable, pay the interest accrued under the interest-only mortgage;

(2) an intention on the part of the customer to utilise an expected, but uncertain, inheritance to repay the capital borrowed and, where applicable, pay the interest accrued under the interest-only mortgage;

and

(3) the sale of the property which is the subject of the regulated mortgage contract, where that is the customer's main residence and the mortgage lender does not⁵ consider whether the property will have the potential to:

(a) provide sufficient funds for the customer to repay the capital borrowed and, where applicable, the interest accrued under the interest-only mortgage; and

(b) allow the customer to purchase a cheaper property to reside in or execute any other associated strategy.

The above list is not exhaustive.

11.6.47 R In complying with n MCOB 11.6.41R (1), where a customer's repayment strategy is the sale of the property which is the subject of the regulated mortgage contract, a mortgage lender may wish to consider, as part of its assessment of that repayment strategy, factors such as the equity in the property when considered in relation to the level of property prices in the relevant area at the time of the consideration or, for a lifetime mortgage, the borrower's life expectancy.

SEEKING MORE TIME TO EFFECT A PRIVATE SALE.

26. A related basis for seeking to suspend a warrant may be to seek more time to effect a private sale. There should be strong facts before attempting to do so. The general rule emerging from the case law is that the power to suspend contained in Section 36 can be used if the borrower has found a private buyer, but not if the proceeds will be significantly insufficient to discharge the entirety of the mortgage debt. See also the power to apply for an order for sale under section 91 of the Law of Property Act 1925. In *Cheltenham & Gloucester Building*

Society v Krausz (1997) 29 HLR 597 the Court of Appeal doubted the correctness of an earlier High Court decision where a Judge allowed an application for an Order for Sale to a private buyer where there was a negative equity and held that it was incumbent on the borrower to make the application under section 91 of the Law of Property Act 1925 before the warrant took effect. A negative equity sale was allowed in Palk v Mortgage Services Ltd [1993] Ch 330 where the lender had no wish to sell. If the proceeds of sale would not be enough there was no jurisdiction under section 36 of the AJA 1970. See also National & Provincial BS v Lloyd (1995) 28 HLR 459 where the borrower provided evidence of expected sales. The Court held that there was insufficient evidence that the borrower would be able within a reasonable time to pay the sums due as required by section 36. In Target Home Loans Ltd v Clothier [1994] 1 All ER 439 the Court of Appeal poured cold water on a plan to sell land at the foot of the borrowers' garden but nevertheless in order to permit a sale of the whole property made an order for possession to take effect in three months.

27. THE MORTGAGE REPOSSESSIONS (TENANT PROTECTION) ACT 2010

- (i) The aim of the Act is to provide limited respite to unauthorised tenants where a tenancy has been granted by a borrower, but without the lender's consent. By comparison, usually with a buy-to-let mortgage, the tenancy will be binding on the lender. If the lender wants vacant possession, it has to comply with the provisions for termination under the tenancy agreement and usually the tenant will have two months' notice.
- (ii) The Act provides that the unauthorised tenant will have a right of audience at the possession hearing. In practice, if the tenant attended the possession hearing, a district judge would usually let them be heard, but this now ensures that they have a formal right to do so.
- (iii) Once the lender obtains a possession order, the order may only be enforced if the lender has given notice of any prescribed step and only after the end of a prescribed period.

Under Regulations 2 and 3 of the Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations 2010/1809 , the prescribed step for the purposes of section 2(2)(a) of the Act is the making, by the mortgagee, of an application to the court for a warrant for possession of the mortgaged dwelling house and the prescribed period is fourteen days after the mortgagee has given notice of this step at the premises, during which the possession order may not be executed.

(iv) On application by the unauthorised tenant, the court has the ability to postpone the date for delivery of possession for a period not exceeding two months.

(v)

Stephen Cottle
GARDEN COURT CHAMBERS

16th May 2018