A PRACTICAL GUIDE TO ENFORCING THE MORTGAGEE'S SECURITY

PART 55 & THE PRE-ACTION PROTOCOL

Jacqueline Lean

Landmark Chambers

Introduction

1. It is hardly news that the number of home possessions on grounds of mortgage arrears has been on the increase for the last 12 months, with a corresponding reaction from the press and Parliament that "something must be done".

2. The figures compiled by the Council of Mortgage Lenders have been quite frightening. Statistics for the third quarter of 2007 show that more possession claims for residential properties were issued on the basis of mortgage arrears (34,717) than standard landlord and tenant possession claims (31,227)[1], and at the beginning of 2009, it was estimated that the number of mortgage arrears possessions could reach 75,000 for 2009 (although on the basis of the first quarter figures this estimate now seems pessimistic).[2]

3. Perhaps the most important development from a legal perspective has been the introduction of the "Pre-action protocol for possession claims based on mortgage or home purchase plan arrears in respect of residential property", which imposes positive obligations on lenders to

[1] Page 11 of the Civil Justice Council Consultation Paper on the Mortgage Arrears Protocol (2008)

[2] "Figure quarters suggest 75,000 repossessions this year now looks pessimistic" Council of Mortgage Lenders, 15th May 2009, available on its website at http://www.cml.org.uk/cml/media/press/2262

engage with borrowers falling into arrears at the earliest possible opportunity, and seeks to give teeth to the aim that possession proceedings should be the "last possible resort".

4. This paper considers the steps which the mortgagor is now required to take prior to commencing proceedings, together with the sanctions which may apply in the case of non-compliance. It then goes on to set out the procedures which must be followed under Part 55 to ensure an expeditious processing of the claim once commenced.

The Pre-Action Protocol

5. The Pre- Action Protocol for Possession Claims (Mortgage) came into force on 19th November 2008, and is intended to encourage mortgage lenders and borrowers to engage with each other as soon as the borrower starts falling into arrears with a view to avoiding possession proceedings.

6. The Protocol applies to:

   (i) First charge residential mortgages and home purchase plans regulated by the Financial Services Authority under the Financial Services and Markets Act 2000;

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

   (iii) Unregulated residential mortgages[3]

7. To a large degree, the Protocol mirrors the provisions of, and guidance, contained in the Mortgage Conduct of Business Rules within the FSA's Mortgages and Home Finance: Conduct of Business Sourcebook.[4] It would, however, be advisable for lenders to ensure they have complied with the requirements set out in the Sourcebook generally, particularly given that the Protocol appears to envisage that lenders should consider postponing claims for

[3] Paragraph 3.1

[4] Available on the FSA's website at http://fsahandbook.info/FSA/html/handbook/MCOB

possession where the borrower has made a "genuine complaint" to the Financial Ombudsman Service about a potential possession claim.[5]

8. The Protocol does not affect the parties' strict legal rights,[6] but it may have some effect on how quickly a mortgagor can obtain possession – particularly if the steps set out therein are not followed.

9. Paragraphs 5.1 to 5.7 sets out the steps which should be taken by both parties as soon as the borrower starts falling into arrears.

10. Firstly, the lender is required to provide the borrower with certain information on the arrears, including

    (i) The total amount of the arrears;

    (ii) The total outstanding on the mortgage or the home purchase plan; and

    (iii) Whether interest or charges will be added, and if so and where appropriate, details or an estimate of the interest or charges that may be payable.[7]

11. In addition, the lender should:

    (i) Where appropriate, provide the borrower with the required regulatory information sheet or the National Homelessness Advice Service booklet on mortgage arrears;[8]

    (ii) Advise the borrower to make early contact with the Local Authority housing department, or, where necessary, refer the borrower to appropriate sources of independent debt advice.[9]

[5] Paragraphs 8.1 and 8.2

[6] Paragraph 1.2

[8] Paragraph 5.1(1)

12. The Protocol also requires that when either party attempts to communicate and provide information, *"reasonable steps should be taken to do so in a way that is clear, fair and not misleading."* In particular, "*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 provided in a way that the borrower can understand."* [10]

13. Secondly, the Protocol provides that the parties should take *"all reasonable steps to discuss with each other, or their representatives, the cause of the arrears, the borrower's financial circumstances and proposals for repayment of the arrears".*[11]

14. If the borrower makes a "*reasonable request*" to change the date of regular payment (within the same payment period) or the method by which payments are to be made, if the lender refuses to accept the same he must provide the borrower with written reasons for its refusal, within a reasonable period of so doing.[12]

15. Similarly, if the borrower makes a proposal for payment, the lender must respond to the same "*promptly*" and, where it does not agree to the proposal, must give the borrower reasons in writing within 10 days.[13]

16. If the proposal emanates from the lender, then they must "s*et out the proposal in sufficient detail to enable the borrower to understand the implications of the proposal*" and give the borrower *"a reasonable period of time"* in which to consider the same.[14]

[9] Paragraph 5.3

[10] Paragraph 2.2

[11] Paragraph 5.2

[12] Paragraph 5.4

[13] Paragraph 5.5

[14] Paragraph 5.6

17. As regards starting a claim for possession, paragraphs 6.1 and 6.2 provide that a lender should consider not starting a claim for possession where:

    (i) The borrower has submitted a claim to an insurer under a mortgage payment protection policy and has provided all the evidence required to process a claim;

    (ii) The borrower has a reasonable expectation of eligibility for payment from the insurer; and

    (iii) The borrower has an ability to pay a mortgage instalment not covered by the insurance; or

    (iv) If the 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.[15]

18. Where the lender decides not to postpone the start of a possession claim it should inform the borrower of the reasons for this decision at least 5 business days before starting proceedings.[16]

19. Alternative dispute resolution is positively encouraged,[17] in particular the discussion of options such as:

    (i) Extending the term of the mortgage;
    (ii) Changing the type of a mortgage;

[15] If the lender agrees to postpone possession proceedings on this basis then paragraph 6.3 of the Protocol provides that the borrower should provide the lender with a copy of the particulars of sale, the HIP, the details of any purchase offers received within a reasonable period of time specified by the lender (where appropriate), 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.

[16] Paragraph 6.4

[17] Paragraphs 7.1, 8.1 and 8.2

(iii) Deferring payment of interest due under the mortgage; or

(iv) Capitalising the arrears

20. Whilst there are no express sanctions for non-compliance set out in the Protocol itself, it is likely that the Courts will expect the parties to explain what actions they have taken to comply with the same at any hearing for possession. As such, it would be advisable for the lender to set out, either in a witness statement or in the Particulars of Claim, what steps they have taken to communicate with the borrower and, if any proposal has been refused, to explain why.

21. Even though the Protocol, expressly, does not affect the parties' legal rights and obligations, it seems likely that a failure by a lender to take any of the steps set out in the Protocol may well result in a delay in its ability to obtain the order it seeks.

22. In the draft Protocol sent out for Consultation by the Civil Justice Council in early 2008[18], there were two suggested sanctions if the lender did not comply with the Protocol:

(i) An order for costs, or direction that the lender should not be entitled to its costs

(ii) An order staying or adjourning the claim

23. Whilst those sanctions have been removed in the final version, it seems that failure to comply with the Protocol might well influence the court's decision whether or not to adjourn the claim at the first hearing.

24. Firstly, if the court considers that s.36 Administration of Justice Act 1970[19] may be engaged, the fact that the lender has not previously given the borrower the opportunity to make any proposals for repayment, or otherwise sought to reach an agreement which would enable

[18] Available on the Civil Justice Council's website at http://www.civiljusticecouncil.gov.uk/files/mortgage-pre-action-protocol-final290208.pdf

[19] S.36 will be considered in more detail in the "Defences" talk.

them to avoid repossession, may well influence the Court's decision to grant an adjournment, or otherwise suspend or postpone any order it may make.

25. Secondly, if there is some doubt, or a lack of information, as to the borrower's prospects of repayment, or of selling the house, or it seems that s.36 may be engaged in the foreseeable future, then it may be that the court would be prepared to grant an adjournment either under its general case-management powers, or Section II of the Practice Direction on pre-action conduct.

26. Paragraph 4.6 of the Practice Direction provides that if the Court is satisfied that there has been non-compliance with either the Practice Direction itself or relevant pre-action protocol it may impose sanctions which include staying (suspending) the proceedings until steps which ought to have been taken have been taken. That is in addition to paragraph 4.1, which provides that the court may take into account non-compliance with a Protocol in deciding its case management directions.

27. Failure to comply with the Protocol might also sound in costs. If the lender has not complied with the Protocol, and the Court adjourns the hearing on that basis, the borrower may want to consider asking the court to direct that the lender is not entitled to add to its security the costs of that hearing.

28. Having regard to the above, it is clear that the importance of the lender taking pro-active steps to interact with the borrower, and seeking to reach some sort of agreement as to how repossession could be avoided, cannot be over-emphasised when the lender is considering starting a claim for possession.

Part 55 and Possession Proceedings

29. The other way in which the Protocol may impact upon possession proceedings themselves is the notice which must be given by the lender before initiating a claim:

(i) If the lender decides not to postpone possession proceedings, it must give the borrower at least 5 business days notice before issuing the claim, with reasons for that decision;[20] and

(ii) If the parties have entered into a repayment agreement and the borrower fails to comply with the same, the lender must warn the borrower, by giving the borrower at least 15 business days notice in writing, of its intention to start a possession claim unless the borrower remedies the breach.[21]

The Claim

30. Upon starting the claim, there are a number of formalities which have to be complied with:

(i) The claim must be started in the county court for the district in which the land is situated, unless an enactment provides otherwise, or it may be started in the High Court if there are "exceptional circumstances";

(ii) The claim must be issued on form N5 and the Particulars of Claim, in form N120, filed and served with the claim form;

(iii) In particular, the Particulars must give details as to:

- Whether a Class F land charge has been registered, or whether a notice under the Matrimonial Homes Act 1983 has been entered or whether a notice under the Family Law Act 1996 has been registered.

- The state of the mortgage account, including:
  - The amount of the advance
  - Periodic payments and interest required
  - The amount needed to redeem the mortgage, including solicitors' costs and administration charges;

[20] Paragraph 6.5

[21] Paragraph 5.7

- The rate of interest payable

- If the mortgage is a regulated consumer agreement, it must state the total amount outstanding.

(iv) If the claim is based on mortgage arrears, the Particulars must set out:

- In schedule form, the dates when the arrears arose, all amounts due, the dates and amounts of all payments made and a running total of the arrears;

- Details of all other payments to be made and claimed;

- Any relevant information about the borrower's circumstances, including details about benefits and payments direct; and

- Any previous steps taken to recover arrears, with full details of any court proceedings.

31. Not only the borrower, but any other persons who are known to be claiming an independent right to occupy, should be joined as defendants. However, this does not mean that an occupier who is not a legal owner, or a spouse who has registered a Class F land charge, notice or caution, must be joined as a defendant.[22]

32. It is not necessary to claim interest and costs, as the lender usually has a contractual entitlement to the same under the terms of the mortgage.

33. The hearing date will be not less than 28 days after the claim is issued, but should not be longer than 8 weeks after that date. The claim form and particulars of claim must be served on the defendant(s) not less than 21 days before the hearing (usually done by the Court) and within 5 days after receiving notification of the date of the hearing by the court the lender must send a notice to the property addressed to "the occupiers". This notice must:

[22] However, a 'connected person' (i.e. a spouse, former spouse, civil partner, former civil partner, co-habitant or former co-habitant) may apply to be joined as a defendant under s.55 Family Law Act 1996 'at any time before the action is finally disposed of'.

(i) State that a possession claim for the property has started;

(ii) Show the name and address of the claimant, the defendant and the court which issued the claim form; and

(iii) Give details of the hearing.

34. The lender must produce a copy of that notice and evidence that he has served it at the hearing. The general rules in CPR Part 6 as to service apply.

The lender's evidence

35. It is advisable for the lender to file and serve a witness statement shortly before the hearing, which:

(i) Updates the arrears and sums required to redeem the mortgage at the date of the statement and at the date of the hearing if no payments are received in the interim;

(ii) Exhibits a copy of the mortgage deed, and the mortgage agreement/terms and conditions (particularly if relying on breaches other than non-payment of instalments);

(iii) Exhibits any calling-in letter sent to the borrower, and sets out the steps taken by the lender to comply with the Pre-action Protocol;

(iv) Exhibits an up-to-date search certificate of HM Land Registry or Land Charges Department (the original of the same should be produced at the hearing);

(v) Confirms that the requisite notice to occupiers has been sent, and exhibits a copy of the same

180 Fleet Street, London, EC4A 2HG | DX:1042 (LDE) | t.020 7430 1221 | f.020 7421 6060 | e.clerks@landmarkchambers.co.uk

36. If the mortgage contains an "all monies" clause, and there are monies outstanding in other accounts secured against the property, then the witness statement should also set out the sums outstanding and rate of interest, updated to the date of the hearing, and this figure should be included in the amount necessary to redeem the mortgage.

37. It should not be necessary for the maker of the statement to attend court, unless it appears that there is likely to be a dispute of fact as to the terms of the mortgage, the actions taken by the lender, any other breach of the mortgage agreement pleaded in the Particulars, or as to the amounts outstanding/necessary to redeem the mortgage.

The borrower

38. On the other hand, it is likely to be important for the borrower to attend the hearing – particularly where the defence is limited to asking the Court to exercise its powers under s.36 Administration of Justice Act 1970.

39. There is no formal requirement for the borrower to file a defence. However, any defence filed should be on form N11M, which must be served together with the claim form. A lender cannot obtain default judgment if no defence is filed, nor is a defendant precluded from taking part in the possession proceedings. (CPR r.55.7)

Potential developments

40. Whilst this seminar is predominantly concerned with enforcing the mortgagee's security by taking possession of the mortgaged property, there is currently a private bill in Parliament which may substantially affect the mortgagee's ability to enforce its security through sale of the same.

41. The Home Repossession (Protection) Bill was introduced by Andrew Dismore in February 2009, and is still awaiting a second reading. The purpose of the Bill is to reverse the High Court decision in *Horsham Properties Group Ltd v. Clark* [2009] 1 P & CR 8, in which Briggs J rejected a claim by a borrower whose house had been sold by receivers appointed by the

mortgagee to a purchaser who then issued a claim for possession that either the sale or the subsequent possession proceedings would infringe her rights under Article 1 of the First Protocol to ECHR. As stated by Mr Dismore in introducing the Bill:

> "*It will require that lenders – sub-prime or otherwise – first obtain the court's permission, before they can call in their security by selling a property that is somebody's home. It will ensure that the court that hears the lenders application will have the power to delay the sale of the property and to give the borrower more time to repay, if that is appropriate in all the circumstances. It does not guarantee that people can stay in their homes indefinitely if they cannot pay the mortgage, but it does ensure that people have an opportunity to persuade an independent court that it is far too early, or disproportionate, to throw them into the street – with bags, baggage, furniture and kids' toys – at the whim of a hard-bitten property company."*

42. The Bill is a short one, containing only one substantive provision, which would, if approved, amend the Law of Property Act 1925 so as to insert new subsections after subsection 1(A) as follows:

> *"(1B) Where the mortgage is a mortgage of land which consists of or includes a dwelling-house, subsection (1)(i) is subject to the mortgagee applying to the court for permission to exercise the power of sale.*
>
> *(1C) On an application by the mortgagee under subsection (1B), the court may exercise any of the powers conferred on it by the subsection (1D) below if it appears to the court that in ht event of its exercising the power the mortgagor is likely to be able within a reasonable time to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage;*
>
> *(1D) The court*
>
> *(a) May adjourn the proceedings, or*
>
> *(b) On giving judgment, or making an order, for sale of the mortgaged property, or at any time before the execution of such judgment or order, may –*
>
> *(i) Stay or suspend execution of the judgment or order, or*

(j) Postpone the date of sale

for such period or periods as the court thinks reasonable

(1E) Any such adjournment, stay, suspension or postponement as is referred to in subsection (ID) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit

(1F) The court may from time to time vary or revoke any condition imposed by virtue of this section."

43. Whilst it is at best unclear as to whether these proposed amendments will ever become law, they would represent another substantial fetter on the lender's power to enforce its security, save as a last resort.

Conclusion

44. It is clear that the majority of the developments outlined above affect the steps a lender must taken before commencing possession proceedings, rather than the requirements of the claim itself. However, given the sanctions which may be imposed for non-compliance, it is vital that lenders are made aware of the importance of complying with the same, and of taking pro-active steps to resolve the problem with the borrower before proceedings are even contemplated, if they are to successfully enforce their security through a claim for possession.

JACQUELINE LEAN
Landmark Chambers
June 2009

180 Fleet Street, London, EC4A 2HG | DX:1042 (LDE) | t.020 7430 1221 | f.020 7421 6060 | e.clerks@landmarkchambers.co.uk