
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

1 Preamble

- 1.1 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.
- 1.2 This Protocol does not alter the parties' rights and obligations.
- 1.3 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.

2 Aims

- 2.1 The aims of this Protocol are to –

- (1) 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; and
 - (2) encourage more pre-action contact between the lender and the borrower in an effort to seek agreement between the parties, and where this cannot be reached, to enable efficient use of the court’s time and resources.
- 2.2 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.

3 Scope

3.1 This Protocol applies to arrears on –

- (1) first charge residential mortgages and home purchase plans regulated by the Financial Services Authority under the Financial Services and Markets Act 2000;
- (2) second charge mortgages over residential property and other secured loans regulated under the Consumer Credit Act 1974 on residential property; and
- (3) unregulated residential mortgages.

3.2 Where a potential claim includes a money claim and a claim for possession this protocol applies to both.

4 Definitions

4.1 In this Protocol –

- (1) ‘possession claim’ means a claim for the recovery of possession of property under Part 55 of the Civil Procedure Rules 1998 (“CPR”);
- (2) ‘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;
- (3) ‘bank holiday’ means a bank holiday under the Banking and Financial Dealings Act 1971;
- (4) ‘business day’ means any day except Saturday, Sunday, a bank holiday, Good Friday or Christmas day; and
- (5) ‘Mortgage Rescue Scheme’ means the shared equity and mortgage to rent scheme established either –

- (a) by the UK Government to help certain categories of vulnerable borrowers avoid repossession of their property in England, announced in September 2008 and opened in January 2009; or
- (b) by the Welsh Assembly Government to help certain categories of vulnerable borrowers avoid repossession of their property in Wales, first announced in June 2008.

II ACTIONS PRIOR TO THE START OF A POSSESSION CLAIM

5 Initial contact and provision of information

- 5.1** Where the borrower falls into arrears the lender must provide the borrower with –
- (1) where appropriate, the required regulatory information sheet or the National Homelessness Advice Service booklet on mortgage arrears; and
 - (2) information concerning the amount of arrears which should include –
 - (a) the total amount of the arrears;
 - (b) the total outstanding of the mortgage or the home purchase plan; and
 - (c) 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.
- 5.2** The parties must 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 (see 7.1). For example, parties should consider whether the causes of the arrears are temporary or long term and whether the borrower may be able to pay the arrears in a reasonable time.
- 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 necessary, refer the borrower to appropriate sources of independent debt advice.
- 5.4** 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.
- 5.5** 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.
- 5.6** 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.

- 5.7** 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.

6 Postponing the start of a possession claim

- 6.1** A lender must consider not starting a possession claim for mortgage arrears where the borrower can demonstrate to the lender that the borrower has –
- (1)** submitted a claim to –
 - (a)** the Department for Works and Pensions (DWP) for Support for Mortgage Interest (SMI); or
 - (b)** an insurer under a mortgage payment protection policy; or
 - (c)** a participating local authority for support under a Mortgage Rescue Scheme, and has provided all the evidence required to process a claim;
 - (2)** a reasonable expectation of eligibility for payment from the DWP or from the insurer or support from the local authority; and
 - (3)** 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).
- 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. 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 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.

7 Further matters to consider before starting a possession claim

Starting a possession claim should normally be a last resort and such a claim must not normally be started unless all other reasonable attempts to resolve the position 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 –

- (1) extend the term of the mortgage;
- (2) change the type of mortgage;
- (3) defer payment of interest due under the mortgage;
- (4) capitalise the arrears; or
- (5) make use of any Government forbearance initiatives in which the lender chooses to participate.

8 Complaints to the Financial Ombudsman Service

- 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 at least 5 business days before doing so.

9 Compliance

- 9.1 Parties must be able, to explain the actions that they have taken to comply with this protocol.

