



Residential mortgages: The legalities surrounding default and repossession.

HUSSAIN, Aansa Iram.

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Residential Mortgages: The Legalities surrounding Default and Repossession

Aansa Iram Hussain

A thesis submitted in fulfillment of the requirements of
Sheffield Hallam University
for the degree of Masters of Law

August 2014

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ABSTRACT

This research study is a critical analysis of the law relating to mortgage repossessions. The main focus is on residential mortgages, where one charge has been granted by the occupiers of the residence. Buy to let mortgages are commercial loans secured on land and therefore fall outside the scope of the study. In order to analyse mortgage repossessions, it is important to study the Law of Mortgages which consists of how it may be defined, the types of mortgages and the formalities for registration.

The study focusses on the rise of repossessions during the years 2011-2014 and the legalities surrounding this area. The statistics can be correlated to the law in place during a particular period. This in turn, allows for an evaluation of whether the existing laws in place are adequate. In relation to this assessment various social issues impact on the statistical data. This data may be considered alongside the economic data and the law in place in order to achieve a conclusion.

It is important to analyse the law and how the courts apply the law in relation to both the mortgagor and mortgagee. It is also necessary to consider the rights of any occupier who is not a party to the mortgage but who may nonetheless possess certain rights in relation to the mortgaged property. A combination of statutory and non-statutory guidance has shaped this area of law. The impact the Human Rights Act 1998 has had in this context will also be considered.

The study involves an exposition of statutory provisions and key cases relevant in this area. Whilst certain common law principles remain crucial in respect of the law which governs domestic mortgage repossessions, various legislative measures and extra-statutory guidelines have also been introduced over time. It is an interesting and important area which will continue to develop. However, in the short term, there is still scope for some drastic change which may come in the near future.

I Aansa Iram Hussain, hereby declare that the material contained in this thesis has not been used in any other submission for an academic award.



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White v City of London Brewery Co (1889) 42 Ch 237.

Williams Glyn's Bank Limited v Boland [1981] AC 487.

Williams v Morgan [1906] 1 Ch 804.

Wood v United Kingdom (1997) 24 EHRR CD6.

LIST OF ABBREVIATIONS

AJA 1970: Administration of Justice Act 1970
AJA 1970: Administration of Justice Act 1973
CAB: Citizens Advice Bureau
CCA: Consumer Credit Act 1974
CML: Council of Mortgage Lenders
FCA: Financial Conduct Authority
FSA: Financial Services Authority
FSMA: Financial Service Market Act 2000
FSO: Financial Services Ombudsman
HA: Housing Act 1988
HA: Housing Act 1996
HPP: Home Purchase Plan
HRA: Human Rights Act 1998
IA: Insolvency Act 1986
LCA: Land Charges Act 1972
LPA: Law of Property Act 1925
LRA: Land Registration Act 2002
MCOB: Mortgages: Conduct of Business
ONS: Office of National Statistics
RSL: Registered Social Landlords
SRA: Solicitors Regulation Authority
TOLATA: Trusts of Land and Appointment of Trustee Act 1996
UTCCR: Unfair Terms in Consumer Contract Regulations 1999

THE DATE OF THE LAW IN THIS THESIS

The law is as stated on 1 January 2014

INTRODUCTION

The main focus of this research study is on the rise of mortgage repossessions in recent years and the range of issues relevant to this area of law. The reason this topic was selected was due to the increasing practical importance of this area of law and the perceived deficiencies of the current legal framework which governs repossession. The topic's importance is due to the growing number of repossessions that have taken place in England and Wales following the onset of the economic recession in 2008, and also because the topic is of relevance and interest to home owners with a mortgage.

The specific focus of this study will be mortgages relating to residential property. The study's principal aim is to examine this topic from the perspective of both the mortgagor and mortgagee, covering their rights, interests and liabilities, and also to look into the occupier's rights which are of significant importance as they can affect the mortgagee's security rights.

Much of the information concerning mortgage arrangements between specific borrower and lenders is not publicly available and concerns issues to do with the mortgagor's personal situation, finances and their private contractual arrangements with their mortgage. Due to the practical problems and ethical implications

associated with obtaining such private information, this thesis will therefore be a black letter, library based study which will involve research based on open source information, comprising case law, parliamentary and industry – focused reports, journal literature and other academic sources.¹

As a starting point, Halsbury's Law of England outlines the Law of Mortgages which provides guidance to the primary legislation and case law. This will be followed by using online legal databases such as Lexis Nexis to locate a variety of reports and journals which refer to this area of law and eliminating the ones which directly relate to my area of research. Academic text is also a useful source in terms of further reading which widens the research and each text gives a different perspective. The above then led to selecting relevant further reading which coincided with the focus of this study.

The potential relevance of the research will mainly be to legal practitioners. This research is also of prospective use to other professionals, such as bankers, surveyors, estate agents and academics in this field, as it will seek to provide a deeper insight into an area which they may have close involvement or interest in. New purchasers, lenders, investors, mortgagors, and also tenants, as future

¹ Due to such information not being publicly available, a black letter methodology is adopted for this thesis. Therefore it will not be possible to undertake any empirical research. The bulk of the methodology will evolve from explaining the processes undertaken and use of existing primary and secondary source materials.

homeowners, may also find this research of interest as it touches on their position in relation to mortgage repossession and will help to make them aware of the potential risks, as well as the incentives, of entering into a mortgage. This research provides such parties with an introduction to, as well as an in-depth insight into, this sometimes complex and daunting area.

The discussion in Chapter 1 will examine the nature and the definition of a mortgage. Non-conventional mortgages have recently become increasingly popular due to the changing needs of society. The rising popularity of such mortgages include Islamic Finance, Shared Equity, Equity Release and Right to Buy Mortgages, which fall under the categories of Home Reversion and Home Purchase Plans and are an alternative method of financing the purchase of a house in accordance with the needs of the mortgagor/s and their family.

By way of context, it is important to consider some background information on how a mortgage is created, together with the formalities required for preparing and registering it are also discussed in Chapter 1.²

The rise in repossessions in recent years is evident from current statistics. Through

² In addition an overview of priorities and tacking are discussed briefly as the focus of this research is primarily on properties subject to a single legal charge.

analysing the statistics provided by such bodies as the Council of Mortgage Lenders (CML), the Ministry of Justice, the Office of National Statistics, and the Bank of England the trends in repossessions in recent years will be identified. It is important to consider the statistical sources alongside the legalities which are presented in this research.

In Chapter 1, the reasons why mortgage repossessions occur, the principal which is amongst them is the mortgagors default on repayment, which will be considered. In exploring this issue, the reports produced by the Citizens Advice Bureau will be considered. The report produced by the Citizens Advice Bureau, looks at these issues. The principal reason of default on repayment has contributed to the overall legal sphere of this area.³ An analysis of such reasons is required to formulate an overall conclusion. Such analysis, together with the possible steps that can be taken to avoid repossession, and the kinds of after-effects repossessions have on the mortgagor, are also crucial to note. Although these are social reasons, they play a significant part in this context and have helped shape the legal regime that is in place today. It is therefore critical not to overlook their significance as discussed in Chapter 1.

However, the bulk of the research concentrates primarily on the mortgagor and

³ For further discussion of these reasons see Lorna Fox, *Conceptualizing Home: Theories, Law and Policies* (Hart 2007).

mortgagee, although the rights of the third - party occupier are also of significance and therefore require analysis in Chapter 3. This is reflected in the leading case of *Williams and Glyn's Bank v Boland*.⁴ The case in particular reflected that a residential mortgage may be obtained to fund a business venture. Although this could apply to any mortgage whatever the purpose, thus putting the rights of the occupier of a property at risk to that of the, mortgagees right to possession. The House of Lords decided that the occupying wife who was not a party to the mortgage had an overriding right over that of the mortgagee right of possession. The research will also discuss both the mortgagor and mortgagee's relationship, but will mainly cover the legal protection available to the mortgagor in Chapter 2, and the rights associated with the mortgagee's proprietary security in Chapter 4. Further analysis is undertaken in relation to the remedies that are available to the mortgagee and the overall effectiveness of these. This will include an explanation of the procedure for enforcing the right to repossession through court proceedings.

Mortgage repossession is now mainly governed by legislation, namely the Law of Property Act 1925, the Administration of Justice Acts 1970 and 1973, and the Land Registration Act 2002. It is also important to consider how the relevant provisions contained in these Acts have been interpreted, and how the powers conferred upon the courts under them have been applied in practice. In addition, human rights also have a part to play. This is of increasing significance from a European perspective

⁴ [1981] AC 487.

and governed by the Human Rights Act 1998. The provisions of the European Convention on Human Rights that could fall into this area of repossession are highlighted accordingly in Chapter 5 of this study.

There is now a considerable body of case law concerning mortgages and repossession, which will be discussed in Chapters 2, 3, 4 and 5. In particular, the key cases of *Norgan*⁵ and *Horsham*⁶, both of which have had significant implications in respects of mortgage law, will be analysed in detail. Although the latter case has limited significance in practice.

As well as statute and case law, this area of law has been heavily regulated by the Financial Services Authority (FSA), the latter of which was replaced by the Financial Conduct Authority (FCA) in April 2013. Ultimately the state exerts some control over such bodies. The study will examine the regulations and guidelines issued by these bodies. The FSA and FCA Handbooks can be accessed online⁷ as reference in accordance with the type of mortgage.

In response to the shortcoming of legislation, case law regulations and guidance, formal practice guidance has been issued via the Pre-action Protocol⁸ and the Law

⁵ [1996] 1 WLR 343.

⁶ [2009] 1 WLR 1255.

⁷ <www.fca.org.uk> and <www.cml.co.uk> accessed 10 May 2013.

⁸ <www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha> accessed 10 June 2013.

Society Practice Notes. The government has also intervened by introducing the Mortgage Rescue Scheme with the intention of assisting struggling homeowners which will be considered in Chapter 2.

There are key academic texts in this area of law by Gray and Gray⁹ which looks into this area and cover the mains aspects in much detail. Their work has provided a firm starting point of the issues at hand as well as providing valuable information to supplement this thesis.

The Home Repossession (Protection) Bill 2008-2009 only had its first reading in Parliament and was subsequently dropped. The recent development, in this area entails the Mortgage Market Review¹⁰, and which aims to shape mortgage lending in the future. At present, this area of law still awaits further development despite the recent changes that it has undergone. This thesis will conclude by identifying any potential future developments and areas in which further research could profitably be undertaken.

The methods of research have been a combination of current affairs on the internet, library based and use of legal databases to conclude to the final result which has

⁹ Kevin Gray and Susan Francis Gray, *Elements of Land Law* ((5th edn, OUP 2009) and Kevin Gray and Susan Francis Gray, *Land Law* (Core Text Series) (7th edn, OUP 2011).

¹⁰ <www.fca.org.uk/firms/firm-types/mortgage-brokers-and-home-finance-lenders/mortgage-market-review> > accessed 31 July 2014.

ultimately outlined the significance of the lenders charge, which falls under the 'hard law'. In comparison the 'soft law' has been created for that of the borrower which in practice does not meet or beat the lenders right to repossession in entirety.

CHAPTER 1

NATURE OF A MORTGAGE

1.1 Mortgage Definition

The focus of the study is on mortgages, as a means of funding the acquisition of residential properties. The notion of a mortgage is straightforward, but no comprehensive statutory definition exists under UK Property Law. A mortgage is security for the loan against the mortgagor's property.

In *Santley v Wilde*,¹¹ a mortgage was defined as an 'a conveyance of land... as security for the payment of a debt or the discharge of some other obligation for which it is given.'¹²

A mortgagor agrees to repay the loan with interest over a specified period of time. If, for, any reason they cannot repay the loan, the mortgagee can assert their right of Possession, and subsequently sell the house to recover the outstanding debt.

Although it may be thought that it is relatively straightforward to define and

¹¹[1899] 2 Ch 474 per Lindley LJ. See also *Swiss Bank Corporation v Lloyds Bank Ltd* [1982] AC 584 at 595 C-D per Buckley LJ.

¹² Lindley LJ.

understand a mortgage, Mortgage Law is very complex as indicated by Lord Macnaughten's statement where he stated that 'no one ... by the light of nature ever understood an English mortgage of real estate.'¹³ Indeed, a mortgage has been described as a 'work of fiction' and a 'confusion of things.'¹⁴

There are two main parties¹⁵ to the mortgage transaction, namely the borrower¹⁶ and the lender.¹⁷ A mortgage is commonly associated with the acquisition of residential property. It has been recorded that up to 60 per cent of owner-occupied properties are subject to a mortgage. Mortgage law has two conflicting principal aims, to protect the mortgagor's home and to protect the mortgagee's security. Although my research illustrates that that latter aim is ultimately the one which succeeds. This may be due to the fact that a mortgage involves a charge over the property by deed, which gives the mortgagee the same rights as if the estate had been transferred to them as the mortgagee has advanced the funds therefore no other right can override this, which results in initial conflict.¹⁸ However the result is in favour of the mortgagee. Despite this certainty each parties interest has been analysed.

¹³ *Samuel v Jarrah Timber and Wood Paving Corporation Ltd* [1904] AC 323 at 326 per Lord Macnaughten.

¹⁴ Gary Watt, *Mortgage Law as Legal Fiction in Modern Studies in Property Law*, Vol 3 (Cooke 2007) 73 and 76.

¹⁵ A significant amount of case law has also considered the rights of a non-owning occupier.

¹⁶ Known as the mortgagor.

¹⁷ Known as the mortgagee.

¹⁸ Law of Property Act 1925, s 87 (1).

Clarke and Kohler¹⁹ analyse the relationship between the mortgagor and mortgagee under five headings. The first one being, the 'right to first recourse.' They state:

'Security over an asset gives the security interest holder the right of first recourse to it. This is not only a good thing in itself, as far as the secured creditor is concerned. It also dramatically reduces the risk in lending. Provided the lender ensures that there is a sufficient margin between the value of the asset it accepts as security and the amount it lends, its return of capital is more or less guaranteed.'²⁰

Clarke and Kohler also comment on the 'significance of the lenders charge and guarantee.' Whatever happens, the lender is guaranteed the amount that they have advanced to the mortgagor. However, in the current property market, some properties are not selling quickly, or are failing to achieve their full market value,²¹ resulting in negative equity. Negative equity is where the amount owed by the mortgagor under the mortgage exceeds the value of the property.

The mortgagee can, however, sue for the shortfall of debt in contract.²² This remedy does seem to illustrate the imbalance in the mortgage relationship between the mortgagor and mortgagee, as it shows the significant power that the mortgagee holds in exercising his rights on the mortgagor's default. But this, itself is not an imbalance as the mortgagee has fully performed and the mortgagor has not, the remedy therefore goes to the injured party who will most likely be the mortgagee in

¹⁹ Alison Clarke and Paul Kohler, *Property Law Commentary and Materials* (Cambridge 2005) 659 para 18.1.2.1.

²⁰ Ibid.

²¹ Graham Norwood 'How to sell your house' The Telegraph (London 31 May.

2013). <www.telegraph.co.uk/property/buyingsellingandmoving/9379319/How-to-sell-your-house> accessed 1 June 2013.

²² For example, *Bristol v West Bartlett* [2003] 1 WLR 284; Limitation Act 1980, s 20.

the majority of mortgage repossession cases.

Clarke and Kohler further comment on the issue of the attachment to the asset, which is known as the mortgagee's interest. They state:

'Since security interests are property interest in the secured asset, in the sense that the asset owner cannot sell the asset free from the security interest unless he either pays off the debt or obtains the lender's consent. If he does neither, the security interest will be fully enforceable against the buyer. This does not make the buyer personally liable for the debt, but it does entitle the security interest holder to sell the asset and recoup the debt out of the proceeds, handing back to the buyer only whatever is left after that.'²³

This function does create a 'give and take' situation where the mortgagee advances the funds to the mortgagor in return for a commitment from the mortgagor to repay the mortgage debt by means of regular, usually monthly, repayments. On initial appearances, this appears to be a fair agreement. However, if the mortgagor partially funds the house purchase, these funds will be lost if he defaults and the sale proceeds are used to recoup the mortgage debt. Even so, this will only apply if the mortgage debt exceeds the price the property is sold for, otherwise the mortgagor is entitled to any remaining funds under LPA, s.105. However, it should be noted that any improvements to the property may increase the property's market value, which may be above and beyond the amount owed to the lender and therefore any surplus will be due to the mortgagor.²⁴

²³ (n 20)

²⁴ Law of Property Act 1925, s 105.

There is also concern about the manner of sale, which Clarke and Kohler summarise this under 'non - judicial enforcement.' They state:

'The security interest holder's primary remedy [...] is to sell the secured asset, and in most cases to do so without first obtaining a court order, or going through any formal procedure. It does not even have to sell by auction: the sale will be an ordinary private sale. This ability to enforce security by a simple self- help process is uncommon in other jurisdictions. It has considerable attraction to the lender. It means that the lender does not have to satisfy anyone in advance that default has justified enforcement [...] there is no public scrutiny of the conduct of the sale or the price obtained, and no time consuming, costly court process to go through[...]' ²⁵

In light of recent legislation and case law, they are in part referring to the *Horsham* situation where there is no requirement under English law at present to seek possession through the court prior to selling although this is a usual course of action.

It is clearly expressed on mortgage advertising to the potential mortgagor that they risk losing their home if they fail to make repayments on time.²⁶ This warning remains with the mortgagor throughout the term of the mortgage. Clarke and Kohler have named this the 'hostage function'.

They state that:

'Security acts as a hostage, providing an incentive to the borrower to comply with the loan agreement. If the lender takes security over an asset that the borrower

²⁵ (n 20).

²⁶ <www.halifax.co.uk/mortgages/?WT.seg_3=Common/promotion/mortgage/hlinkg/mortga-mortgage-lnkg-mortgage00> accessed 5 June 2012.

values highly, fear of losing the asset will induce the borrower to go to great lengths than it might otherwise have done to keep up the payments. When money is short, it will make these repayments before paying other debts, and it will hesitate before engaging in risky behavior which might endanger its ability to repay [...]. This helps to explain why lending money on the security of people's homes is such good business [...]' ²⁷

This will always remain the case, whereby the mortgagee will indirectly and automatically impose their right upon the mortgagor. However, the FSA has discouraged this and instead encouraged dealing with customers in arrears fairly.²⁸ Even so, at the back of a mortgagor's mind there will always be that fear which will remind them that they must ensure that they keep up to date with their mortgage payments, which leads to Clarke and Kohler's last function of 'signaling, monitoring and control.'

They state:

'A debtor who offers a valued asset as security can be said to be signaling his confidence that he will be able to repay, thus lessening the need for the lender to engage in expensive checks on his creditworthiness. If the asset has a predictable market value which is greater than the proposed loan, the creditor has even less need to check creditworthiness [.....]

[.....] Security can also be used as a means of enabling the lender to monitor the behavior of the borrower. The terms of a security interest over assets will usually require the borrower to maintain the value of the secured asset by keeping it in good state of repair, to insure it [...] and notify the lender of any event threatening the value of the secured asset or the ability of the borrower to repay.'

²⁷ (n 20).

²⁸ FSA Handbook, Arrears and repossessions: regulated mortgage contracts and home purchase plans (MCOB 13) <www.fsa.gov.uk/handbook> accessed 10 May 2013.

In practice, once the mortgage funds are advanced, there is little personal contact between the mortgagee and mortgagor. The mortgagor is primarily a number who is on the mortgagee's database. The only contact that may come about is when the mortgagor fails to make a payment.

This is when the mortgagee is prompted by their database system to make personal contact with that individual. So this notion of signaling, monitoring and controlling takes a 'second seat' and is not consistently active in respect of the mortgagor and mortgagee's relationship before any mortgage payments are missed. In all eventualities, the mortgagee will only interfere if prompted by a missed payment.

Another interesting point that Clarke states is:

'The value to the mortgagee of the mortgage fluctuates depending on the likelihood of the mortgagor repaying the debt in full and in time with – paradoxically – the value of the mortgage decreasing as the likelihood of default decreases.'²⁹

The assumption is that if repayments are made continuously, there is less chance that the mortgagor will default, unless some unforeseen circumstances arise.

It is common to hear from a borrower, 'I am getting a mortgage', making it sound that

²⁹ Alison Clarke 'Security Interests as Property: Re-locating Security Interests within the Property Framework' in JW Harris (ed) *Property Problems: From Genes to Pension Funds* (Kluwer Law International 1997) 122.

the mortgagee is doing them a huge favour, however, the truth behind this is that the borrower is doing the lender a favour by allowing them to place a charge on their property and promising to repay the mortgagee the capital plus interest. The mortgagee gives the mortgagor money to make money themselves and therefore there are no sentimental favour's but a commercial imperative to the whole transaction. However, the mortgagor does have the option to remortgage at any time during the term of the mortgage,³⁰ if the mortgagor is not happy with their existing lender. As discussed above, the relationship between the mortgagor and mortgagee is a simple formula to follow. However, issues arise if this formula is not followed by each party. In some cases, the law has provided not more than just guidance in this respect, with the judges exercising their powers both in favour of the mortgagor and mortgagee.

1.2 Mortgage Registration

Historically, there were a number of different types of mortgages and charges,³¹ the focus in this thesis is legal residential acquisition mortgages which fall within the modern method of registration of title and therefore nowadays the correct legal term used nowadays is a registered charge.³² For legal purposes, a mortgage includes any 'charge or lien on any property for securing money or money's worth.'³³

³⁰ A remortgage allows another lender to repay the existing debt with the view that a further mortgage is taken by the mortgagor with that mortgagee. The previous mortgagee's charge is removed and a subsequent charge is placed in favour of the new lender. There may be penalties payable to the lender.

³¹ For a fuller account, see Charles Harpum, Stuart Bridge and Martin Dixon *Megarry and Wade's Law of Real Property* (7th edn Sweet and Maxwell 2008) 1079-1089.

³² Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, Oxford 2009).

³³ Law of Property Act 1925, s 205(1) (xvi).

After 13 October 2003, when the Land Registration Act 2002 came into effect, executing a deed by way of a legal mortgage was the only way of creating a mortgage of registered estate.

The requirements of a legal charge are that it must:

- (i) be made by deed, as a charge merely made in writing will have no effect in law
- (ii) be expressed to be by way of legal mortgage: the deed must contain a statement that the charge is made by way of legal mortgage, and
- (iii) in relation to a registered estate be properly registered in accordance with the provisions of s 72 (2) (f) and Schedule 2 to the Land Registration Act 2002.

The Act further states that a sub-mortgage must take the form of a charge on the indebtedness of the initial charge rather than a charge on the estate itself. The current method of creation applies to all registered freehold and leaseholds with the requirement that any previous unregistered properties are registered for the first time and follow this method. The legal charge method simplifies the process of locating the reference within the property documents. It also creates no actual sub-lease in favour of the mortgagee. Also the obvious advantage is that it is short and simple, as there are no bundle of historic documents to go through. This is crucial in today's competitive, fast pace property transactions.

Historically, there was not a need to document the mortgage transaction in writing.

This was purely done by handing over the deeds to the mortgagee. Mortgagees no longer require the deposit of deeds. However, the mortgagee has a legal right to the deeds under the Law of Property Act, Ss. 85, 86 and 87. Similarly, with a legal mortgage of leasehold before 1926, the mortgagee was entitled to take possession of the lease.

Nowadays, the formalities required to create a contract for the mortgage are stipulated in the Law of Property (Miscellaneous Provisions) Act 1989.³⁴ These state that it must be made in writing, signed by both parties incorporated and all the terms agreed.³⁵ To create the mortgage or charge deed the 1989 Act requires signed writing and a witness to the signature. This must be actioned promptly and must be sent to the Land Registry on a Charge Form.³⁶ The lender must be advised of any delays in registration at Land Registry.³⁷ The lender must also be advised when the registration is completed and confirmed by the Land Registry.³⁸ It is crucial for the legal practitioner acting for the mortgagee to ensure that the legal charge has been placed by the Land Registry on the register, as this will evidence and allow the mortgagee to exercise their right in the event of possession.³⁹

³⁴ Under s.2.

³⁵ This document is known as a Legal Charge or Mortgage Deed – See Appendix.

³⁶ See Appendix known as a CH1 Form.

³⁷ The Law Society Conveyancing Protocol: Stage F: Post -Completion: Stage F 67 Page 30<www.lawsociety.org.uk/accreditation/documents/cqs-protocol/> accessed on 10 June 2012.

³⁸ The Law Society Conveyancing Protocol: Stage F: Post -Completion: Stage F 69 Page 31 <www.lawsociety.org.uk/accreditation/documents/cqs-protocol/> accessed 10 June 2012.

³⁹ See Chapter 3.

In the case of unregistered property, if the freehold or leasehold has more than 7 years on the Lease, there is the compulsory requirement that the Lease must also be registered and is subject to a 'protected first legal mortgage' under the Land Registration Act 2002, s 4(1)(g), (8), 6(2)(a).⁴⁰

The 'protected first legal mortgage' is defined by s 4(8) of the Land Registration Act 2002 as follows:

4(8) For the purposes of subsection (1)(g)

(a) a legal mortgage is protected if it takes effect on its creation as a mortgage to be protected by the deposit of documents relating to the mortgaged estate, and

(b) a first legal mortgage is one which on its creation ranks in priority ahead of any other mortgages then affecting the mortgaged estate.

The Land Registry no longer issue land or charge certificates,⁴¹ and after registration they hold no legal significance. These have now been replaced by a Title Information Document⁴² also known as the property register, which will hold information about how the property is held, together with any existing charge(s). For the purposes of the mortgagee, they are protected under this document and it is likely that a restriction⁴³ will be inserted onto this document which will not allow the mortgagor to carry out any further transaction in relation to the property without the

⁴⁰ The requirement of registration thus affects most first legal mortgages executed in England and Wales on or after 1 April 1998.

⁴¹ The Land Registry issued these to the legal mortgagee, ie the lender, who has lent money on the security of registered land.

⁴² <www.landregistry.gov.uk/public/faqs/what-is-a-register#sthash.OZhr3sX0.dpuf> accessed 1st March 2012.

⁴³ Land Registration Act 2002, s43 (1) (a) and (b) See also Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, Oxford 2009).

prior consent of the mortgagee. Currently, only the legal mortgage is registered at the Land Registry by way of an application by correspondence. The Land Registry now allows the electronic transmission of the mortgage deed.⁴⁴ This method may cause concern for the mortgagee, as until this transmission takes place or if this is not undertaken by error, the charge will not have effect in law or equity.

When the mortgagor has repaid the mortgage the lender will be required to inform the Land Registry by way of a discharge form, although some mortgagees have an electronic means to deal with this instantly. This involves the discharge of capital and interest. The discharge may take place by the sale of the property or if the mortgagor has sufficient funds to redeem. In case of repossessions, a discharge may take place under the mortgagee's power of sale or by foreclosure.

1.3 Mortgage Statistics

Over time the charge by deed has become the dominant method of creation as reflected in the Land Registration Act 2002, s 23(1)(a). It is therefore relevant to analyse the statistical data which is direct result of this method of registration.

A mortgage is the only option for most to acquire a house, particularly in England

⁴⁴ <www.landregistry.gov.uk/professional/e-document-registration-service> accessed 28 May 2014.

and Wales. This is encouraged by the Government despite the high price of property in England and Wales which does not compel people to obtain a mortgage. Over the last decade, the amount of domestic lending in the financial sector has increased.

The Council of Mortgage Lenders are a trade association whose 'purpose is to represent lender and promote sustainable housing finance in the UK.'⁴⁵ According to CML's statistics in 2011, there are currently 11.2 million mortgages.⁴⁶ The CML reported in May 2013 that 'gross mortgage lending increased by 21 per cent,'⁴⁷ more recently CML reported 'Gross mortgage lending was an estimated £16.6 billion in April 2014, according to the Council of Mortgage Lenders. This is 8% higher than March's gross lending total and 36% higher than April 2013 (£12.2 billion) and the highest total for an April since 2008 (£25.7 billion).'⁴⁸

The size of mortgage industry has increased dramatically over the years. In 2004, the figure of lending stood at £291,224 million,⁴⁹ with 40 per cent of households owning their house with the aid of a mortgage.⁵⁰ However, this dramatically decreased with the onset of the recession in 2008 to £237,095 million.⁵¹ The recession of 2008 also impacted on the increase in repossessions. The CML had

⁴⁵ <www.cml.org.uk> accessed 10 June 2011.

⁴⁶ <www.cml.org.uk/cml/media/press/3883> accessed 10 June 2011.

⁴⁷ <www.cml.org.uk/cml/media/press/3581> accessed 13 July 2012.

⁴⁸ <www.cml.org.uk/cml/media/press/3904> accessed 14 June 2012.

⁴⁹ Bank of England Monetary and Financial Statistics, August 2005 Table A5.10.

⁵⁰ Office for National Statistics, Social Trends 39 (2009) 146.

⁵¹ Bank of England Monetary and Financial statistics, November 2010 Table A5.3.

forecasted 65,000 mortgage repossessions in 2009.⁵²

The CML reported as follows:

'The number of properties taken into possession by mortgage lenders in the third quarter of 2011 was 9,200, virtually unchanged from 9,100 in the second quarter, according to the latest survey data from the Council of Mortgage Lenders.'

'The number of repossessions in the quarter equated to 0.08% of all mortgages. This has been the same for five of the last six quarters, with the exception of the fourth quarter of 2010, which experienced a typical seasonal dip, to 0.07%.'

'So far this year, a total of 27,500 properties have been taken into possession - 4% fewer than in the equivalent period last year. It now appears likely that the total number of repossessions in 2011 will be lower than the CML's forecast of 40,000.'

'There was a slight fall in the number of households in arrears with their mortgage across all categories. At the end of September, the total number of mortgages with arrears of 2.5% or more of the outstanding balance fell to 161,600 (1.44% of all loans), down 2% from 165,200 (1.47% of all loans) and 8% lower than the 175,100 cases (1.55% of all loans) at the end of September 2010.'⁵³

Despite the state of economy the figures reflect gradual recovery from the recession following the banking crisis. Although the dilemma has not been resolved in full and seems to working gradually the after effects may be seen for some time. All parties are to cooperate in order to resolve the issues in attempt to bring back the prosperous results.

⁵² Office for National Statistics, Social Trends 40 (2010) 153.

⁵³ <www.cml.org.uk/cml/media/press/3073> accessed 5 July 2012.

The CML in 2011 stated that there was a decrease in mortgages repossession figures from the previous months which indicated that the situation was improving. Despite this, low interest rates have helped people with mortgages. The director of CML, Paul Smee, was optimistic in the approach to repossessions and commented:

‘...the fall in the number of mortgages in arrears, and the stable picture on repossession are testament not only to the beneficial effects of low interest rates, but also to effective arrears management and good communication between lenders, borrowers and debt counselling organisations.’⁵⁴

He further assured that ‘lenders will do their utmost to help borrowers keep their homes, whatever the pressures emerge.’⁵⁵ This statement is very comforting to mortgagors but despite this according to the statistics that amount of repossessions is at a significant increase and it appears although this statement may apply to cases facing repossession it may not be applying to all.

But the CML said the ‘the Bank of England’s forecast for no growth in the economy is a reminder of the pressures that may disturb the current pattern of stability.’⁵⁶

Paul Smee commented:

The figures show that lenders, borrowers and debt advisers are working together to get through the current period of economic difficulty and keep

⁵⁴ <www.cml.org.uk/cml/media/press/3073> accessed 5 July 2012.

⁵⁵ <www.cml.org.uk/cml/media/press/3073> accessed 5 July 2012.

⁵⁶ <www.politics.co.uk/opinion-formers/council-of-mortgage-lenders-cml/article/cml-fall-in-mortgage-possession-and-flat-arrears-in-second> accessed 9 October 2012.

mortgage possessions in check. Generally, when borrowers prioritise their mortgage commitments, lenders can provide help appropriate to their individual circumstances. But success in managing temporary payment problems depends on everyone working together and it is essential for anyone worried about their mortgage to talk to their lender as soon as possible.⁵⁷

The CML further reported:

The number of mortgages in arrears remained stable in the third quarter in 2012. At the end of September, the total number of mortgages with arrears of 2.5 per cent or more of the outstanding balance rose slightly to 159,100, up from 158,700 in the previous quarter but still down on the 165,300 in arrears in the same period last year.

Levels of arrears in the lower and middle bands remained consistent with the previous three months but there was a small increase from 28,600 to 29,000 in those mortgages with the highest levels of arrears - more than 10 per cent of the balance.

A total of 26,300 properties were taken into possession in the first three quarters of 2012, 8 per cent fewer than in the first three quarters of last year. While the repossession rate equated to 0.13per cent in the buy-to-let sector, the rate was just 0.06 per cent in the owner-occupier sector – resulting in an overall repossession rate of 0.07per cent in the quarter.

Commenting on the above data, Paul Smee said:

Our figures show that good communication and effective arrears management by borrowers, lenders and money advisers are helping the vast majority of those with mortgage repayment problems. The rate of repossession has continued to fall and it's clear that lenders want to keep people in their homes.

Repossession really is a last resort but it's essential for anyone worried about their mortgage to talk to their lender as soon as possible – it is more difficult to resolve problems when they are not tackled early. These are the statistics to date however, the picture still remains unstable and it is worth noting that the effects of

⁵⁷ <www.cml.org.uk/cml/media/press/3272> accessed 10 October 2012.

repossession are likely to stay with us for some time.⁵⁸

A further report stated:

The rate of repossession in the three months January to March 2013 remained at 0.07 per cent for the fourth consecutive quarter, according to data published today by the Council of Mortgage Lenders. This rate is the equivalent of fewer than 1 in 1,400 mortgaged being taken into possession by lenders each quarter.

Arrears also remain stable. The number of mortgages in arrears has been similar across all categories for at least a year, and the underlying trend is unchanged. At the end of the first quarter some 159,800 mortgages had arrears equivalent to 2.5 per cent or more of the mortgage balance. This number was equivalent to 1.4 per cent of all mortgages - the same proportion both as last quarter, and as the same quarter last year.

Within the total number of mortgages in arrears, 82,600 mortgages had arrears equivalent to 2.5 per cent or more but less than 5 per cent of the mortgage balance, 32,000 5-7.5 per cent of the balance, 14,900 7.5-10 per cent of the balance, and 30,300 10 per cent or more of the balance.

A total of 8,000 properties were taken into possession (down from 9,600 in the first quarter of 2012, but showing the usual seasonal pattern of an upturn from the fourth quarter figure of 7,700). Around 20 per cent of repossessions were on buy-to-let rather than owner-occupier properties.

The CML's last forecast for 2013 anticipated that there would be a total of 35,000 repossessions in 2013, with 160,000 mortgages in arrears of 2.5 per cent or more at the end of the year. The CML has no imminent plans to revise this forecast.⁵⁹

CML director general Paul Smee further commented:

Mortgage arrears and repossessions have stabilised at levels lower than many anticipated when the economic downturn started. Low interest rates, continuing

⁵⁸ <www.cml.org.uk> accessed 10 March 2013.

⁵⁹ <www.mortgagefinancegazette.com/category/arrears/> accessed 12 July 2013.

employment, lender forbearance and tactical public policy support have combined to ensure that repossession really is a last resort.

Anyone who is worried about their mortgage can be assured that, as long as they take steps early to address them, most problems can be contained. Lenders very much want to enable people to stay in their homes wherever they have sustainable prospects of getting their mortgage back on track.⁶⁰

This is favourable to the mortgagor as it gives them the opportunity to stay in their home. Despite the fact that a lender is a commercial institution and every day they are making a loss when the mortgagor is unable to repay their mortgage.

Nevertheless, despite the downturn, the property market in general seems to be improving gradually and what seemed to be a severe hit over the last few years seems to be recovering for the better. The main reason of mortgage repossession was a result of the economic recession although there are also minor contributing factors which impact on its existence.

1.4 Contributing Factors to Mortgage Repossession

The 2008 increase in repossession is associated with the recession, as an unhealthy economy impacts on household finances such as a mortgage. This then

⁶⁰ <cml.org.uk/news/press-releases/3516/> accessed 10 July 2013.

subsequently, impacts on the individual and their household both psychologically and socially.

There has always been a strong link between social policy and the law. However, when considering Mortgage Law, it appears that there are arguably some shortcomings, in the sociological aspects together with also some external factors which contribute to mortgage repossessions.⁶¹ These sociological aspects have been illustrated in studies that have found why people fall into debt. Ford's study of mortgage arrears found that:

...arrears rarely result from isolated events but are better thought of as the outcome of chains of events, as any one particular disruption sets in train other changes that may also further stretch the budget. If the government so keenly encourage mortgages then it would be just and adequate for the government to have a plan in place if mortgagors are having difficulty. Although some initiatives were introduced it appears that they do not physically hand over the money to individuals or assist them by any means to make their financial situation any better. They may just support them by allowing them to request that their debtors such as mortgagees to hold off but the issue still remain they need to be able to afford the repayments otherwise they risk losing their homes...⁶²

Many mortgages are obtained through a broker, known as a financial advisor. They have the responsibility for searching the whole of the mortgage market and recommending a mortgage which suits a mortgagor's needs and circumstances. There is an assumption that it is less difficult⁶³ to obtain a mortgage through a

⁶¹ Right Honourable Lord Justice Thorpe, 'Property Rights in Family Breakdown' [2002] Family Law 891; Citizens Advice Bureau Research Report, *Set up to Fail* (2007).

⁶² J Ford, E Kempson and M Wilson, Mortgage arrears and possessions perspectives from borrowers, lenders and the courts (1995) 65.

⁶³ Peter Tutton and Sue Edwards, *CAB Clients experience of mortgage and secured loan arrears problems* (CAB 2007).

broker, as the affordability criteria is not as rigorous. Individuals with poor credit rating, bankruptcy and County Court judgments, are offered credit through brokers which is the next option if refused a mortgage from a high street lender.

Mortgagees may be seen as encouraging the less financially able into debt or further debt. It may therefore be questioned why there are such lenient mortgagees who are willingly attracting such potential mortgagors, knowing that they pose a high risk of defaulting. It causes concern, as it may suggest that such mortgagees reserve such an opportunity for individuals with a history of bad credit and then use it to their advantage. This is easily accessible as many adverts by financial brokers encourage individuals to apply for a mortgage even if they have a bad credit history. Therefore this should be discouraged as it ultimately leads to entering into 'bad loans' to buy property.

The risk factor also extends to the fact that mortgagees cannot forecast income prospects for the self-employed and currently even for the employed, particularly in this economic climate where there is a high level of risk of redundancies⁶⁴ and unemployment.⁶⁵ The number of high street lenders offering insurance cover⁶⁶ for such unforeseen circumstances has declined, and lenders do not make the

⁶⁴ <www.ons.gov.uk/ons/taxonomy/index.html?nscl=Redundancies> accessed 12 October 2012.

⁶⁵ In 2008 when the recession was apparent, unemployment rose from 5.2% to 7.9% by 2009. See Office of National Statistics (Labour Force Survey, Data table; MGSX GDP, Data table YBEZ).

⁶⁶ Such insurances do not cover the reduction of income whilst working nor against relationship breakdown: J Ford, D Quilgars, R Burrows and D Rhode, 'Homeowners Risk and Safety Nets: Mortgage Payment Protection Insurance (MPPI) and beyond' [2004] [ODPM] 26.

necessary checks that need to be place before one can proceed with the mortgage approval. Although this may not be the answer as there has been some mis-selling around such policies. Even if the mortgagor had the insurance, some policies do not cover the whole of the mortgage payments for the entirety of the mortgage term, leading to an influx of payment protection claims.⁶⁷ This added to the other reasons for default which increased the number of repossessions back in 1999.⁶⁸ In addition, there has been added pressure on current mortgagors to support their adult children due to the difficulties in first time buyers unable to get a mortgage.⁶⁹

The Right to Buy Scheme encouraged people to buy their homes with the aid of a mortgage, which in effect maintains the culture of homeownership. This scheme involved council tenants being given the opportunity to purchase their existing tenanted council home with the aid of a mortgage.⁷⁰ In comparison to tenancy, tenants could be evicted from their home if they were in arrears with their rent.

However, further to this point, case law is moving towards the idea where the mortgage repayments would accumulate and the mortgagor would be given the

⁶⁷ E Kempson, J Ford and D Quilgars -*Unsafe Safety Nets* (Centre for Housing Policy 1999).

⁶⁸ J Ford and B Burrows, 'The Costs of Unsustainable Home Ownership in Britain' (1999) 28 *Journal of Social Policy* 305.

⁶⁹ Becky Barrow<www.dailymail.co.uk/news/article-2327674/staggering-million-parents-50-grown-children-living-home.html> accessed 2 April 2012.

⁷⁰ Initially though the Housing Act 1980, gave local authority tenants the right to buy their home at a substantial discount, and later the Housing Act 1996 which extended this to the tenants of Housing Associations through the right to acquire homes owned by registered social landlords. See GA Jones, 'Assessing the success of the Sale of Social Housing in the UK' (2007) 29 *Journal of Social Welfare and Family Law* 135.

opportunity to repay their mortgage gradually.⁷¹ This appears to be favourable to the mortgagor but there is no certainty to when the mortgage will be repaid and interest would continuously accrue. The mortgagor does not lose their home immediately, it seems that the mortgagor may repay back more and above the original amount unless possession is prevented. This does not benefit the mortgagor and there is risk of negative equity⁷² if this is extended unnecessarily. This is not ideal for mortgagees either, although it may ensure that they will receive some repayments gradually. It is argued that the suggestion of extending repayment terms to their limits should be avoided for the benefit of both the mortgagor and mortgagee. However, this suggestion must not be ignored altogether as there is a possibility of it being advantageous, if its purpose is to give the mortgagor sufficient time to sort out their financial situation but only in a non- negative equity situation.

It should also be noted that with a mortgage there comes the additional expenditure of house maintenance, insurance, utility bills, together with other annual costs of running a household. These all need to be dealt with, as well as the mortgage which is classed by contract, to the extent that the house may be repossessed as a priority debt. However, a mortgage is not the only priority debt. There are other priority debts, such as Her Majesty's Revenue and Customs taxes, Council Tax, loans, credit cards, all in respect of which legal action can be taken if not repaid on time. All of

⁷¹ See Chapter 5.

⁷² Negative equity is when the amount outstanding to the mortgagee exceeds the market value of the property. For the date of negative equity in the residential housing sector in the recession that began in 2008, see Office for National statistics, Social Trends 40 (2010) 151.

these costs will inevitably impact upon a person's ability to repay their mortgage.

Repossessions also stem from unemployment which increased significantly during the recession. The effects of recession can be long lasting, taking time to settle, this is apparent from the year 2008 to the present day.⁷³ This continued effect can impact on family circumstances leading to breakdown of relationships⁷⁴ which may result in separation or divorce proceedings.⁷⁵ Such proceedings can ultimately lead to mortgage repossession if neither party named on the mortgage is willing to pay the mortgage or has insufficient funds to purchase the other's share and come to a mutual agreement in relation to the matrimonial home. After divorce, the finances of some couples can prove difficult.⁷⁶ For many whichever situation they are in, renting is not an option as the pressure of high rents alternatively puts the pressure on entering the housing ladder once again but possibly on a smaller scale this time.

The normal reaction to mortgage repossession would be stress and anxiety in the household. On one side of the scale, an individual may blame themselves, or on the other side may not be concerned at all. It all depends on the individual's attachment to the property. For someone who believes it to be their home, then repossession is devastating news for them unless they bought the house with pressure from their spouse. In such a situation, if that relationship came to an end then they would not

⁷³ See figures from Labour Force Survey from 1971-2011.

⁷⁴ M Blekesuncu 'Unemployment and Partnership Dissolution' (ISER 2000 Working Paper No 2008-21).

⁷⁵ P Pleasance and N Balmer, 'On the Rocks: Recession related Life Problems and Relationship Stability.' *Child and Family Law Quarterly* 24 (1), 39-59.

⁷⁶ Rebecca Probert, *Cretney and Probert's Family Law* (7th edn, Sweet and Maxwell 2009).

have any great attachment to the house. In comparison, an investor would be more concerned about the financial loss of losing his deposit, the amount of payments he has made already, together with the predicted future profit he was going to make in terms of rental income and the resale value rather than the emotional attachment to the property.

If the mortgagor is fortunate enough to have repaid their mortgage or is mortgage free, there may be risk implications if they decided then to take an equity release mortgage.⁷⁷ This is usually taken by elderly mortgagors. With an equity release mortgage there is no guarantee that there will be enough funds left after the death of the mortgagor.

These are all instances which relate to the risk of having a mortgage, which must be considered before taking such a long-term financial commitment.⁷⁸

Lorna Fox has stated that the law is ignorant of the 'meaning of home within the legal sphere.' There are questions about who is responsible for a family's inability to meet

⁷⁷ See Chapter 2.

⁷⁸ The above reasons have a direct link with the present government policies and the law. The reality is that the Government and their policies do to some extent determine the mortgagor's financial wellbeing. This includes whether they are likely to fall behind with their mortgage repayments. If the mortgagor is unable to repay the mortgage, they begin to lose control over their home. But this is only another statistic to the Government if the mortgagor's house is repossessed. For example Fox states Home Related issues in the Family Law Act 1996, and the intangible or emotional aspects that are compensated for through home loss payments when homes are subject to compulsory purchase under s 29 of the Land Compensation Act 1973.

mortgage repayments⁷⁹ and Fox questions the justification of individual blame in legal processes and policy. Clearly, if the mortgagees did not take practical action and were willing to negotiate then clearly a mortgagor would not lose their home. This notion of home is ignored as default triggers instant repossession. The political ideology in the United Kingdom has always instilled the idea of home ownership but this ideology does not recognise the term 'home' if a mortgagor does fall behind with their mortgage repayments. It is more the case that, the Government actively encourages individuals to buy their home but then does not quite completely assist them financially in the event of repossession.

There is further disillusion with the term 'home owner'. It is assumed that once a house is bought with the assistance of a mortgage, one is a home owner or at least the Government classes them as a home owner; in fact one is a home buyer with a mortgage and this is the true reality. When the Government states it wants one to buy their own house, it is referring to one becoming a homebuyer as opposed to a homeowner. It is interesting to note this shift from homebuyer to homeowner to homebuyer. Patrick McAuslan states:

The Government has a definite conflict of interest in the matter in that as the owner or major shareholder in several banks that makes it the largest

⁷⁹ For a discussion on the conceptualisation of risk and implications for socio-legal processes and housing policy see J Croft, 'A Risk ' or 'At Risk' conceptualising Housing Debt in a Risk Welfare' (2001) 16 Housing Studies 737).

mortgagee in the country, it has a financial interest in speeding up repossession and sales of repossessed homes. This may explain its reluctance to legislate and its attempt to influence discretion by administrative means. Mortgages however, should be regulated by law and not administrative fiat.⁸⁰

There appears to be a conflict over this intermingling relationship between the mortgagor and mortgagee. Although there is enough legislation and case law to deal with this, from a legal point of view, it appears that the mortgagee's rights prevail. Without doubt, the mortgagor has the sentimental or emotional attachment to the house which the mortgagee will never have but due to the mortgagee advancing the bulk of the funds to purchase the property, this seems to be far more important than any attachment that the mortgagee may have. As with any commercial transaction the monetary aspect prevails.

Fox asserts:

...the law is not intended to provide psychological and social solutions to victims but to bring justice and fairness. Psychological and social issues will remain and the law cannot be expected to heal these - they will remain to be separate subjects which will require psychological and social solutions - a matter which is distinctly from law even though it is so closely inter-related to the subject of mortgage repossession and could affect almost anyone that has a mortgage.⁸¹

⁸⁰ Patrick McAuslan 'Mortgage arrears: the repossession crunch' (2009) 24 (3) *Journal of International Banking and Financial Law* 137.

⁸¹ Lorna Fox, *Conceptualising Home: Theories, Law and Policies* (Hart 2007) p39.

Although interesting and significant to the topic for the purposes of this study, the legal issues must always be considered over the sociological reasons, even though such sociological reasons will always form part of the legal sphere during and after repossessions. Such vulnerable mortgagors in our society will look to the law to protect them and their home. The sociological issues of today have resulted in the existing law responding with flexibility. United Kingdom judges have therefore readjusted their decisions accordingly to meet the balance between the interest of the mortgagee and mortgagors in line with today's justice issues. Therefore a range of factors contribute to culture of home ownership, causes of default and the factual scenarios encountered in repossession cases.

CHAPTER 2

THE RIGHTS OF THE MORTGAGOR

2.1 Protection before a mortgage is granted

In consideration of the mortgage products that are available on the market there is a need for bespoke legal advice relevant to the mortgage product selected. Currently neither is the legal advisor or the financial advisor authorised to give this advice nor does either profession stipulate who should be providing this. This is due to the fact that the financial advisor is not a legal expert and the legal advisor is not a finance expert and each expert must be careful not to cross the line. This results in an increase in negligence cases before our judges who may have the legal expertise but not the financial expertise in order to resolve cases satisfactorily. It would therefore be more appropriate to introduce a legal-financial consultant who would be responsible in advising the mortgagor both of the legal and financial aspects of the transaction followed by written confirmation that the mortgagor has understood all aspects of the transaction. Any concerns should be raised with the mortgagee at this stage for them to make a decision on whether they wish to proceed and similarly the mortgagee should confirm in writing that they have considered all factors put to them and they wish to proceed accordingly.

Currently the Financial Conduct Authority's role is to consider the fairness of the

terms in Financial Service Contracts issued by a FCA regulated firm or their appointed representatives but this would only come into play once the mortgage has been taken.

It is worth noting that the Mortgage Deed is usually drawn up by the mortgagee's legal representatives and the mortgagor has very little input in agreeing the terms of the deed. It is usual practice for the mortgagor's legal representatives to report to the mortgagor on the mortgage offer, but very little is said about the clauses in the mortgage deed and their detailed implications for the mortgagor. The reason for this is apparent, that on default of the mortgage payments the lender will seek to obtain possession.

In most conveyancing matters, the legal practitioner acts for both the lender and borrower known as joint representation. In such joint representation cases where the legal practitioner acts for the both the mortgagor and mortgagee, the legal representative's duty is not to question or make any amendments to such clauses but to outline them to the mortgagor when reporting to them on the mortgage offer. This in itself seems unbalanced, as any detrimental clauses may not be questioned or amended.

However, nowadays many mortgagees have chosen to use law firms who are on

their panel, in such a situation the mortgagee has the option of appointing their legal representatives. This assures the mortgagee that the legal representative acts in accordance to the professional ethics.

The level of legal protection for the lay mortgagor involves no input in drafting the legal terms of the mortgage deed, and in some instances may not even check or question these due to the mortgagor's need for the mortgage funds. By entering into a transaction in this manner, it may be reasonable to think that the mortgagor will require some sort of protection from the courts as a fall back if everything does not go to plan. However the mortgagor cannot totally rely on this protection as the mortgagee will want to gain possession of the property at all cost.

2.2 Market Negotiation

2.2.1 Market Power

Whitehouse has commented on the increase of regulation of mortgages as follows:

'The promotion of home ownership has allowed central government to replace direct state intervention with the regulation offered by the market system. The private contractual basis of mortgage finance makes it eminently suitable for regulation by the market. Because of the varied types of accommodation available within the owner-occupied sector and the wide range of mortgagees willing to offer different types of mortgage products, the state could reduce intervention within the housing

system and allow market forces to regulate the activities of mortgagors and mortgagees.⁸²

This suggests taking the regulation out of the control of the courts and regulating mortgages by authoritative agencies as there is no need of Government intervention. The argument is that the State leaves regulation to market forces although the State regulates the market through the Financial Conduct Authority. However, it must not be forgotten that when a dispute arises, legislation and case law play a significant role, which Whitehouse also accepts, as she states, 'The protection afforded to homeowners therefore is claimed to derive from a combination of market regulation and direct legal intention.'⁸³

It is worth noting that the FSA's (now the FCA) recent changes to the mortgage market have been very active. However it appears that the lender is being inundated by the amount of guidance. It is becoming unrealistic to follow every set of guidance followed by further guidance every couple of months. It appears that one set of guidance is followed by further guidance that repeats the same point with the general point of fairness to the mortgagor. It would arguably be more practical, for the mortgagor's rights to come together to produce a finalised, coherent and consistent guidance document which would act as the lenders 'bible' in mortgage

⁸² Lisa Whitehouse, 'The Homeowner Citizen or Consumer?' in *Land Law Themes and Perspectives* (eds Bright and Dewar 1998 p 189)

⁸³ Ibid as above.

repossessions. This would also form a good basis for English judges alongside legislation and case law.

2.2.2 Professional Support

The legal practitioner has a general duty, where acting for a lender as well as for a buyer or seller. In addition, careful consideration must be given in relation to the possibility of a conflict of interest arising when acting for more than one party: sellers, buyers and lenders.⁸⁴ The Privy Council confirmed that the legal practitioner's role was limited to explaining only the legal nature of the mortgage.⁸⁵ However, subsequent cases have concerned conflict of interest between clients⁸⁶ and if the legal practitioner's advice is not followed, to refuse to act.⁸⁷

There is an assumption that every borrower will understand the technical concepts of a mortgage. The duty lies on the mortgagee's mortgage advisor to explain the 'small print' to them and also to inform them on the products available. However, the proposed mortgagor does appoint a legal practitioner to advise them on the mortgage offer once the mortgage has been approved.⁸⁸

⁸⁴ Law Society Conveyancing Protocol: General Obligations 2 page 1 <www.lawsociety.org.uk/accreditation/documents/cqs-protocol> accessed 10 May 2012.

⁸⁵ *Boyce v Moyat* [1994] 1 AC 428.

⁸⁶ *Mortgage Express Limited v Bowerman* [1996] 2 All ER 836.

⁸⁷ *Credit Lyonnais Bank Nederland v Buren* [1997] 1 All ER 144 at 156 per Millett LJ.

⁸⁸ The type of advice outlined in the paragraph is provided in relation to first or acquisition mortgages, but is not generally given in relation to second or equity release mortgages.

A report on the mortgage offer is dispatched to the mortgagor, who signs the mortgage deed and returns this to their legal practitioner. The legal practitioner may ask the mortgagor to contact them in case of doubt. They are in effect obeying their duty to advise them and further to this, allowing them to raise any doubts. If the mortgagor ignores this then they may be unable to challenge any discrepancies later.⁸⁹

The terminology in a mortgage is complex and archaic, which can be to the detriment of the lay mortgagor. In response, the lay mortgagor may potentially take three approaches. They will either not read the mortgage deed at all, read it and not approach their legal practitioner for further clarification, or read it and ask any unclear clauses to be explained. The mere purpose of signing any legal document is to confirm agreement to the terms and conditions. Although it is apparent that the mortgagor relies on their legal representative's advice, nevertheless the mortgagor is still bound by these terms.

The new Certificate of Title introduces undertakings in separate representation cases. Where acting for the mortgagor, an undertaking is given to the mortgagee's solicitor which states that they have advised the mortgagor on the mortgage deed

⁸⁹ Based on the author's observations of the standard approach adopted in practice.

and they have signed this in their presence. If the mortgage deed has been sent out by post, then this does not cover this undertaking, as in joint applications involving spouses for example, the husband could forge the wife's signature without the wife knowing. If a legal practitioner gives an undertaking, the courts take a strict view on this and the legal practitioner could be struck off if they do not adhere to this. The legal representative will also be liable to the mortgagee if inappropriate advice is given.⁹⁰

There is a vast amount of guidance in this area of law which is repetitive and lengthy, in which the guidance is located across a diverse range of sources, including case law, statute and guidelines. It is argued that there is a need for concise legislation which amalgamates all areas of Mortgage Law in order for the parties, their advisors and the courts to follow them with ease.

2.2.3 Legal Safeguards against abuse

A mortgage is one of the biggest debts an individual will take in their lifetime. The principles of contract law apply to a mortgage. However, mortgages are charges over real property, however and are also governed by Land Law with statutory provisions and case law being important in their creation, protection and

⁹⁰ <www.cml.org.uk/lenders-handbook/englandandwales/> accessed on 5 June 2013 and James Hall, 'Breach of trust by conveyancing solicitors - the strongest of all lender claims?' (2012) 26(4) Trust Law International 206.

enforcement. The contract is between the mortgagor and mortgagee. The terms of the contract now need to be express in the form of a mortgage deed.⁹¹ The two bodies of law therefore create a double safeguard for regulation, they extend the mortgagors and mortgagee's control and protection. Although mortgages are effectively by both contract and Land Law, each of these areas of law may conflict, and in such a situation it will be for the court to decide which area of law will prevail, as in *Jones v Morgan*.⁹²

In this case, the contractual nature of the mortgage was not in line with the proprietary interest. The case involved the mortgagee who lent the mortgagor money to convert an old farmhouse into a residential home and the flats. The mortgage agreement was varied in order to allow the mortgagor to sell some of the mortgaged land to release funds to repay some of the debt and transfer the remaining property to the mortgagee. The court in the first instance decided that this was a clog on the equity of redemption and so did the Court of Appeal.

2.3 Substantive Law

2.3.1 The Equity of redemption

The courts view on redemption is, that the mortgagor should be allowed to redeem

⁹¹ See Land Registration Act 2002, s 23 (1) (a) and an example at Appendix.

⁹² [2001] EWCA Civ 995.

at any time i.e. repay the mortgage in full and own the property unencumbered by the mortgagee's charge.

Also, when the agreement is drawn up, the mortgagor is given the contractual right to redeem the mortgage, this is known as the legal right to redeem. The mortgagor has the basic right to redeem the mortgage any time during the term of the mortgage unless the contract stipulates that the mortgage must be redeemed on a particular date. Therefore, there is no recourse to allow the mortgagor to redeem before the equitable right to redeem which continues up until the expiry of the mortgage term.⁹³

In equity the mortgagor owns the equitable right of redemption which consists of the mortgagor's rights in relation to the land. It is in effect an interest in land and holds the same significance as any other equitable interest.

2.3.2 No clogs on the equity of redemption

There are three types of contractual terms which may impede redemption.

- (i) Any provision in a mortgage preventing the redemption clause will be classed as void.

The mortgagor cannot stipulate that if a certain event occurs, the land would become

⁹³ *Onia Meat & Cold Storage Kregliner v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at p35.

his absolutely.⁹⁴ Such terms are generally deemed to be unfair.⁹⁵ This rule also covers any option to give the mortgagee any right to purchase the property which would ultimately banish the mortgagor's right to redeem. Therefore such a clause is void in law and equity in accordance to *Jones v Morgan*.⁹⁶ It was questioned in *Vernon v Bethall*⁹⁷ whether it is possible to give a mortgagee an option to purchase the property by a term in the mortgage contract. This would not be an option under a mortgagor/ mortgagee relationship, as the mortgagor would be giving up their right to redeem, which would not allow the property to be transferred to him and any charge removed. Lord Henley applauded this rule in *Vernon v Bethall*. He stated that, 'there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any term that the crafty may improve upon them.'⁹⁸

This rule was applied in the House of Lords in *Samuel v Jarrah Timber & Wood Paving Corporation Limited*,⁹⁹ as it prevents the mortgagor from getting the property back. Here Lord Linley said that 'once a mortgage always a mortgage' and further said:

..the doctrine ... means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or in other words, as one of the terms of the loan can be valid if it prevents the mortgagor from getting back his property on paying off what is

⁹⁴ *Toomes v Conset* (1745) 3 Atk 261.

⁹⁵ See *Tanwar Enterprises PTY Limited v Cauchi* [2003] 217 CLR 315 at [136] Callinan J.

⁹⁶ [2002] 1 EGLR 125.

⁹⁷ [1904] AC 323.

⁹⁸ [1792] 2 Eden 110 at 113 28 ER 838 at 839.

⁹⁹ [1904] AC 323.

due on his security. Any bargain which has that effect is invalid and is inconsistent with the transaction being a mortgage.¹⁰⁰

A situation could occur whereby such provisions may be suggested after the mortgage has begun, but in *Lewis v Frank Love Limited*¹⁰¹ this gave the mortgagor the opportunity to refuse such suggestions as the mortgagee was granted an option which did not relate to the original mortgage. This was further considered in 2002 by the Court of Appeal in *Jones v Morgan*,¹⁰² and it was confirmed in this case that such action would clog the equity of redemption and was therefore invalid. Lord Philips MR summed up his thoughts on this issue by stating the doctrine of a clog on the equity of redemption is, '...an appendix to our law which no longer serves a useful purpose and would be better excised.'¹⁰³

However, a situation should be differentiated from a sale and repurchase transaction, as was in the case of *Warnborough Ltd v Garmite Ltd*.¹⁰⁴ where the option to purchase the property is given to the mortgagee in a separate and independent transaction and where the option did not form part of the mortgage itself.¹⁰⁵ The two contrasting cases that illustrate this, are *Fairclough v Swan Brewery Co. Ltd*¹⁰⁶ and *Knightsbridge Estate Trust Ltd v Byrne*.¹⁰⁷ In the former

¹⁰⁰ Ibid para 329.

¹⁰¹ [1961] 1WLR 261.

¹⁰² [2002] 1 EGLR 125.

¹⁰³ Ibid at para 86.

¹⁰⁴ [2003] EWCA Civ 1544.

¹⁰⁵ *Reeve v Lisle* [1902] AC 461.

¹⁰⁶ [1912] AC 565.

¹⁰⁷ [1939] Ch 441.

case there was a clause in the contract which did not allow redemption of the mortgage until 6 weeks before the end of the lease. The lease ran for 172 years and therefore The Privy Council decided that the term was void, as it did not allow the existing mortgagor to redeem the mortgage at all. However in order for postponement to be considered the clause must be oppressive resulting in the mortgagor not being able to redeem at all. The mortgagor cannot simply raise the postponement issue if the contract is simply not favourable.

However in the latter case of *Knightsbridge Estate Trust v Byrne*, the courts were of a different view, here two commercial organisations entered into a mortgage, where a clause prohibited the mortgagor from redeeming the mortgage for 40 years. The courts view in this case was that the term was not unreasonable as both parties were businesses negotiating at arm's length and therefore the term was neither unconscionable nor oppressive.

Unconscionability is the key element that the courts will look as defined in the case of *Multiservice Bookbinding Ltd v Marden*,¹⁰⁸ where Browne –Wilkinson J stated that this can be shown if 'one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his

conscience’.

In this particular case, the mortgage agreement contained the following clauses which were considered as unconscionable:

- The mortgage agreement postponed the redemption for 10 years.
- The interest was capitalised after 21 days, so if the mortgagor fell behind with mortgage payments this would result in paying interest on interest.
- The mortgage agreement also index linked the value of the amount loaned and interest payable to the Swiss Franc.

However despite these clauses, the terms of the mortgage was upheld as it was considered that the agreement was harsh but not unconscionable.

- (ii) Any collateral advantage for the mortgagee is the final clog on the equity of redemption.

The mortgagor is protected from the mortgagee obtaining an additional advantage, as part of the mortgage. There are many such examples of additional advantages.

Receiving the property back in its original condition is an example of a collateral advantage. This was illustrated in the case of *Bradley v Carritt*¹⁰⁹ where this was struck down for being a ‘clog’ or ‘fetter’ on the equity of redemption. In this case, a mortgage of tea shares required the mortgagor to use his best endeavours to

¹⁰⁹ [1903] AC 253.

ensure the employment of the mortgagee as the tea broker to the company (before and after redemption).

In the case of *Noakes v Rice*¹¹⁰ the mortgagee, who was a brewery imposed a condition on the mortgagor who was a pub landlord that he must purchase all this beer from the mortgagee. As with postponement, the key element for the court to set aside the case would be unconscionability. The court is of the view that although such terms should not clog the equity of redemption, the parties are able to draw a separate agreement bearing in mind the mortgage agreement.

This was considered in the case of *Kreglinger v New Patagonia Meat and Cold Company Limited*.¹¹¹ In this case, the mortgagor was a meat-preserving company and the mortgagee was a firm of Woolbrokers. In the mortgage agreement, they agreed for the first five years of the mortgage, the mortgagor would only sell their sheepskins to the mortgagee in return for the market value of them from the mortgagee who would not also demand the repayment of the mortgage during that first five years. After two and a half years the mortgagor repaid the mortgage and ultimately argued that what was agreed was unfair now that they had repaid the mortgage. The House of Lords considered the case under unfairness and unconscionability and stated that that the agreement was a 'collateral bargain' and

¹¹⁰ [1902] AC 24.

¹¹¹ [1914] AC 25.

did not fetter the equity of redemption, therefore it did not require further consideration. Lord Mersey¹¹² interestingly described the doctrine of clogs and fetters as 'an unruly dog, which, if not securely chained to its own kennel, is prone to wander into places where it should not be.'

2.4 Administration of Justice Act - Possession

2.4.1 Common Law Right of Possession

Under s.98, of the Law of Property Act allows that mortgagor the right to bring the right to sue any action in relation to the land.

2.4.2 Statutory Reform

Where the mortgagee brings an action to take possession of a 'dwelling house' the mortgagor may avail themselves to the protection under s.36 of the Administration of Justice Act 1970 (AJA) (as amended by s 8 of the AJA 1973 which provides that the court:

(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 of the mortgaged property ... the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

¹¹² At 46.

(2)

- a) May adjourn the proceedings, or
- b) On giving judgement, or making an order, for delivery of possession of the mortgaged property, or at any time before execution of such judgement or order, may –
 - i) Stay or suspend execution of the judgement or order, or
 - ii) Postpone the date for delivery of possession ,
For such period or periods as the court thinks reasonable.

(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made 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.

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

When the court considers granting the order for possession, they have discretion to stay the order for short time to allow all mortgagors to organise their affairs.¹¹³ So in effect an application by a mortgagor would be successful if the mortgagor can evidence that he has or she can is able to pay 'any sums due under the mortgage' within a 'reasonable time' only if they had sufficient equity in the property.

That led to the enactment of s.8 of the Administration of Justice Act 1973, which provides:

(1) Where by a mortgage of land which consists of or includes a dwelling house, or by any agreement between the mortgagee under such a mortgage and the mortgagor, the mortgagor is entitled or is to be permitted to pay the principal sum secured by instalments or otherwise to defer payment of it in

¹¹³ *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883.

whole or in part, but provision is also made for earlier payment in the event of any default by the mortgagor or of a demand by the mortgagee or otherwise, then for purposes of section 36 of [the 1970 Act] (under which a court has power to delay giving a mortgagee possession of the mortgaged property so as to allow the mortgagor a reasonable time to pay any sums due under the mortgage) a court may treat as due under the mortgage on account of the principal sum secured and of interest on it only such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment.

(2) A court shall not exercise by virtue of subsection (1) above the powers conferred by section 36 of [the 1970 Act] 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 (in accordance with subsection (1) above) 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 if there had been no such provision as is referred to in subsection (1) above for earlier payment ...

2.4.3 Case Law on Statutory Sections

The reference in sub-s (1) to 'any sums due under the mortgage' was restrictively interpreted in case law as referring to the entire mortgage debt¹¹⁴ as reiterated in *Norgan* which would ultimately restrict s.36 relief in practice to a very limited range of cases as, 'if the mortgagor was already in difficulties with his instalments, the chances of his being able to pay off the whole principal as well in a reasonable time must be considered fairly slim.'¹¹⁵

¹¹⁴ See *Halifax Building Society v Clark* [1973] 2 All ER 33 at 38, [1973] Ch 307 at 313 per Pennycuik V-C).

¹¹⁵ See *Habib Bank Ltd v Taylor* [1982] 3 All ER 561 at 564, [1982] 1 WLR 1218 at 1222 per Oliver LJ.

That ultimately led to the enactment of s.8 of the Administration of Justice Act 1973, which provides:

'(1) Where by a mortgage of land which consists of or includes a dwelling house, or by any agreement between the mortgagee under such a mortgage and the mortgagor, the mortgagor is entitled or is to be permitted to pay the principal sum secured by instalments or otherwise to defer payment of it in whole or in part, but provision is also made for earlier payment in the event of any default by the mortgagor or of a demand by the mortgagee or otherwise, then for purposes of section 36 of [the 1970 Act] (under which a court has power to delay giving a mortgagee possession of the mortgaged property so as to allow the mortgagor a reasonable time to pay any sums due under the mortgage) a court may treat as due under the mortgage on account of the principal sum secured and of interest on it only such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment.

(2) A court shall not exercise by virtue of subsection (1) above the powers conferred by section 36 of [the 1970 Act] 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 (in accordance with subsection (1) above) 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 if there had been no such provision as is referred to in subsection (1) above for earlier payment ...'

The Supreme Court Practice 1995 vol 1, para 88/5/9 succinctly summarises the effect of those two sections, in the common situation (also applicable in this case) where the whole mortgage debt becomes repayable on default, in this way:

In such a case a Court may, in exercising its discretion under s 36, treat the sum due under the mortgage as being only the arrears of instalments or interest. It may exercise its jurisdiction under the section if it appears that the borrower is likely to be able within a reasonable period to bring his payments up-to-date by paying off all arrears at the date of the order and the payments falling due after the date of the order...

Therefore 'any sums due' could include the whole of the mortgage debt and not just the mortgage arrears as in the case of *Halifax Building Society v Clark*¹¹⁶ where the agreement in *Cheltenham and Gloucester Building Society v Norgan* stated that when assessing a 'reasonable period' for the purposes of s 36 of the 1970 Act and s. 8 of the 1973 Act for the payment of arrears by a defaulting mortgagor, it was appropriate for the court to take account of the whole of the remaining part of the original term of the mortgage and, accordingly, the existing practice of imposing a shorter fixed period of two or more years should no longer be followed. But AJA 1973 s. 8 (1) clarified the position by stating 'any sums due' was only the arrears provided that the court had taken into account and the mortgagors ability to make any further mortgage payments under s. 8 (2) of the Act. However it should be noted that in this case it was stated that this should not apply where there was no prospect of the mortgagor repaying the debt in full.¹¹⁷

This landmark case of *Cheltenham and Gloucester Building Society v Norgan* involved, Mrs Norgan who mortgaged the family home, which was already in her sole name to Cheltenham and Gloucester Building Society as security for a loan of £90,000 which she used to fund her husband's business. Under the terms of the mortgage the whole amount became due and the building society obtained a possession order. When they obtained a possession order this was stayed on more than one occasion resulting in the arrears to increase substantially. The case looked

¹¹⁶ [1973] Ch 307.

¹¹⁷ *Birmingham Citizens Permanent Building Society v Caunt* [1962] 1 All ER 163 at 182, [1962] Ch 883 at 912 per Russell J.

into what amounted to a 'reasonable' period where the mortgager continually had difficulty with meeting payments.

Evans LJ stated in this case that:

The mortgagor is expected to prove to the court whether he can repay the arrears together with the monthly mortgage payment. Section 36 does not account for the issues that may surround the monthly payments.¹¹⁸

Evans LJ agreed with Waite LJ in that it is reasonable to take account of the whole remaining part of the original term when assessing a 'reasonable period', which amounted to thirteen years in this particular case. As dicta in *Norgan* the cases of *First Middlesbrough Trading and Mortgage Co Ltd v Cunningham*¹¹⁹ was used. As reported in *Norgan*:

This was a case of default under an instalment mortgage. The original mortgage principal was £850 repayable by instalments of capital and interest at the rate of £3 per week. By the date of the hearing before the judge the amount of the instalments in arrear was £142 and the total balance then owing on the mortgage was £514. The judge had made an order for possession in favour of the mortgagee, but suspended it for so long as the instalments due under the mortgage plus a further specific amount off the arrears were paid weekly.

Although s 8 had by then been enacted, the case had to be decided, because of the date of the hearing at first instance, under s 36 as interpreted under the previous law, without reference to s 8. Scarman LJ made it plain that he did not share the interpretation put upon s 36 in *Halifax v Clark* but proceeded on the basis that it was right--ie that the 'sums due' were the whole of the mortgage debt. In determining what would be reasonable period for repayment of 'any sums due under the mortgage' for the purposes of s 36(2),

¹¹⁸ At 356.

¹¹⁹ (1974) 28 P & CR 69.

he asked that question independently under the separate heads of repayment of the outstanding principal and future interest on the one hand and the repayment of arrears on the other.¹²⁰

Secondly as dicta in *Norgan* the case of *Western Bank Ltd v Schindler*¹²¹ was reported on as follows:

'That was an instance of a more unusual case, where the mortgagee was seeking possession as of right--that is to say in the absence of any default in payment by the mortgagor--in simple reliance on the legal estate conferred on it under a charge carrying a right to possession as soon (in the vivid phrase) as the ink was dry on it. The Court of Appeal held by a majority (Buckley and Scarman LJJ) that a distinction must be drawn between cases where the mortgagor is in default and those where he is not. In the former (default) case a reasonable period for the purposes of s 36(2) must be measured 'by what is reasonable for the purposes indicated in the conditional clause in sub-s(1)' (see [1976] 2 All ER 393 at 400, [1977] Ch 1 at 14 per Buckley LJ); in other words it must be a reasonable period for the mortgagor to 'find the necessary money or remedy the default' (see [1976] 2 All ER 393 at 404, [1977] Ch 1 at 19 per Scarman LJ). In the latter (no default) case Buckley LJ said 'In a suitable case the specified period might even be the whole remaining prospective life of the mortgage (see [1976] 2 All ER 393 at 400, [1977] Ch 1 at 14).'¹²²

In considering the decision in the case of *Norgan*, regard was given to CMLs current practice of mortgage lenders when dealing with mortgage arrears and possession cases¹²³ and Evans LJ concluded with several suggested conditions for a court when applying its discretion under s.36 (1) as follows and allowed the appeal on this basis.

- (a) The amount the borrower could afford to pay
- (b) If the borrower has a temporary difficulty in meeting his obligations
- (c) The reasons for the arrears
- (d) How much remains of the original term
- (e) What is the relevant contractual term
- (f) Should the court exercise its power to disregard accelerated payment provisions?

¹²⁰ At 454.

¹²¹ [1976] 2 All ER 393, [1977] Ch 1.

¹²² (n116).

¹²³ At 455.

- (g) Is it reasonable to expect the lender to recoup the arrears of interest
- (h) Any reasons affecting the security

The court will take into account the answers to the above to exercise its overall discretion taking into account any other factors. The above guidelines give relief to the vulnerable borrower as the courts allow the borrower the opportunity for the borrowers home to be saved on the condition the borrower can strongly demonstrate that any arrears will be repaid. This will only be considered if the mortgagor disclosed his income and expenditure. This decision is significant for future homeowners who may be in a similar situation although it should be noted that in this particular case there was sufficient equity in order to consider an application under s.36. Therefore not all mortgagors are able to rely on this statutory protection, particularly if they do not have equity in their property. Although the protection is there it has its limitations for the mortgagor who is in negative equity.

In relation to this decision, H W Williamson¹²⁴ commented that 'it is not clear whether the decision of the appeal court represents a debtor's delight or defaulter's delusion'.

As Wilkinson correctly states, this decision effectively reverses the burden of proof in mortgage repossession cases. This decision is a welcome for mortgagors, but disappointing to mortgagees who, in effect could be waiting a significant number of

¹²⁴ Mortgage Repayments – in your own time?' 1996 New Law Journal 23 February 252.

years before their debt is repaid. This opportunity would act as a last resort for the mortgagor who would be under pressure to prove that he will be able repay his arrears. Furthermore, according to latest statistics 71 per cent of possession applications are granted so the court only suspends in 29 per cent of cases.¹²⁵ There is an additional threat posed towards both the mortgagor and mortgagee. If this arrangement does not work, the amount of debt could rise further leaving the mortgagee and mortgagor in need to seek the further guidance of the courts to resolve the issue and no doubt incur further unnecessarily expense.

Patrick McAuslan¹²⁶ takes the view that 'the mortgage term should be extended'. This is a fair point but this should be looked on a case to case basis. If it means to extend the term with the intention the mortgagor's financial position betters, then this is a sensible approach for both the mortgagor and mortgagee. It must not become common belief that this excessive flexibility is routinely available as there is a risk that the mortgagor's financial position may worsen. This may be the real reason why there is no further law in this respect. As with any concept there are limits, the risk occurs when the limits are exceeded.

It must also be noted that s.36 only applies only if the mortgagee has sought an

¹²⁵ <www.gov.uk/government/uploads/system/uploads/attachmentdata/file/257007/mortgage-landlords-possession-bulletin-q3-2013.pdf> accessed 31 December 2013.

¹²⁶ Patrick McAuslan 'Mortgage arrears: the repossession crunch' (2009) 24 (3) Journal of International Banking and Financial Law 137.

order for possession and in the absence of such an order the court is unable to exercise its discretion as in the case of *Ropaigealach v Barclays Bank plc*.¹²⁷ In this case when the mortgagors fell behind with their payments the Bank wrote to them to notify them of their intention to repossess the property and sell it at auction. On the date notified, the Bank took possession and sold the property. As the mortgagors were not at the property due to it being refurbished, they also claimed that they received no letters from the Bank. They sought clarification on AJA 1970, s.36, the Court of Appeal held that the court could only exercise the powers under s.36 if the mortgagee had begun an action for possession. If the mortgagee did not require such order and were legally entitled to take possession then the mortgagor will not be afforded the protection of s.36.

However this is not uncommon, from studying various possession hearings it appears that it is not uncommon practice for the judgement in relation to s.36 to be passed in favour of the mortgagee. In the case of *Bristol and West Building Society v Ellis*¹²⁸ a decision was made by the court to immediate possession after the mortgagees appeal as there was no certainty that the property would sell after 3-5 years and discharge the debt in full. In this case the courts considered the ruling in *Norgan* as a starting point whereby 'in the absence of unusual circumstances and where discharge of all arrears by periodic payments is proposed, the outstanding period of the mortgage, whether term or repayment, is the starting point in

¹²⁷ [1999] 4 All ER 235.

¹²⁸ [1996] EWCA Civ 1294 73 P & CR 158.

determining the reasonableness of the period for payment of sums due under the mortgage.¹²⁹ It was further stated in the judgement, that where the mortgagor's 'only prospect of repaying the entire mortgage loan and accrued and accruing interest is from the sale of the property, the only guidance is that the reasonableness of the period is a matter for the Court in the circumstances of the case.'¹³⁰ The judgement continued to consider that there should 'be evidence, or at least some informal material¹³¹ before the Court of the likelihood of a sale, the proceeds of which will discharge the debt and of the period within which such a sale is likely to be achieved.' A similar decision was made in *Barclays Bank v Alcorn & Amor*¹³² where the judge decided that the mortgagor was not likely to be able within a reasonable period to pay off what is due under the mortgage even after considering the valuation of the whole of the parcel of land which consisted of a Cottage and the building plots in addition to the mortgagors home and such an appeal under s.36 of the Administration of Justice Act was dismissed. The *Norgan* case is favourable to the mortgagor however despite this the courts are reluctant to use this proceeding hearings as reflected above. A further case known as *Halifax Plc v Okin*¹³³ reinforces this view and where Judge Collier considered the mortgagors circumstances and came to the conclusion that the mortgagor would not be able to repay the sums due even if the relaxed approach in *Norgan* were considered. Despite having s.36 of the Administration of Justice Act in place, overall possession

¹²⁹ Auld LJ at 161.

¹³⁰ See *Royal Canada Trust Co. of Canada v Markham* [1975] 1 W.L.R 1416 CA and *National Provincial Building Society v Lloyd* [1996] 1 All ER 630, CA.

¹³¹ See *Cheltenham & Gloucester Building Society v Grant* (1994) 26 H.L.R 703 CA.

¹³² [2002] EWHC 492 (Ch).

¹³³ [2007] EWCA Civ 567.

hearings reflect that the courts favour the lenders security which appears a difficult hurdle to overcome in comparison to the mortgagor's financial inability or partial ability to repay the mortgage.

The case of *Horsham Properties Group v Clark*¹³⁴ was also an example of another case where the statutory protection under s.36 of AJA did not apply. In this case, when the mortgagors fell behind with the repayments, when the mortgagee sold the property. However the mortgagors remained in the property and when the purchaser sought to remove them they claimed protection under s.36 of AJA and the Human Rights Act 1998. The court held that s.36 could not be triggered by claim for possession by a purchase. The Human Rights Act 1998, has not changed the legal status of s.101 of the Law of Property Act. It remains lawful to exercise the Law of Property 1925, s.101 without first going to court to obtain a possession, although guidance encourages mortgagees not to do so. Where the mortgagee exercises s. 101 and sells the property without first gaining possession, they do not 'obtain possession' of the property, they sell it, and by that means recover the debt owed to them.

It is then up to the purchaser to obtain possession of the property as in the case of *Horsham*. The Administration of Justice Act, s.36 does not come into play if the

¹³⁴ [2008] EWHC 2327 (Ch).

mortgagee does not exercise s.101 power of sale without first obtaining possession.

The claimants in *Horsham* claimed that s.101 of the Law of Property Act was incompatible with the Convention Rights protected under the Human Rights Act 1998. However the court held that it did not breach the Convention. In *Horsham Properties v Clarke Briggs J* held that:

The exercise of a statutory power of sale under s.101 after a relevant default by the mortgagor is not a deprivation of possessions within the meaning of A1FP and, a fortiori, the exercise by receivers appointed and acting under purely contractual powers...cannot be either. In my judgment, any deprivation of possessions constituted by the exercise by a mortgagee of its powers under s 101...after a relevant default by the mortgagor is justified in the public interest, and requires no case-by-case exercise of a proportionality discretion by the court for the following reasons:

First, it reflects the bargain habitually drawn between mortgagors and mortgagees for nearly 200 years, in which the ability of a mortgagee to sell the property offered as a security without having to go to court has been identified as a central and essential aspect of the security necessarily to be provided if substantial property based secured lending is to be available at affordable rates of interest. That it is in the public interest that property buyers and owners should be able to obtain lending for that purpose can hardly be open to doubt.

Secondly, I am bound by the decision of the Court of Appeal in *Ropaigealach* (supra) to conclude that there was no wider policy behind s.36 of the Administration of Justice Act 1970 than to put back what the courts had shortly before taken away, namely a discretion to stay or adjourn proceedings for possession, triggered only where the mortgagee considered it necessary or appropriate to go to court in the first place.

As to issues three and four, if I had concluded that the ability of a mortgagee to sell the mortgaged property without first obtaining possession, or an order of the court, both engaged and contravened A1FP, I would not have concluded that any construction of s.101, however purposive, could have led to the recognition of a statutory requirement first to seek a court order permitting sale. That would override the central purpose of s.101 and its statutory predecessors, namely to give the mortgagee the ability to realise its security over the mortgaged property without having to go to court.

As for Article 8, it is equally well established, for example by *Harrow LBC v. Qazi* (supra) that although the loss of the right to possession of a dwelling house does not automatically lead that house to cease to be the former owner's home, Article 8 was not intended to interfere with the legal rights of the person entitled to possession against the occupier such that, if a claimant had an unqualified right to possession (as in the present case), there was nothing in Article 8 to prevent the enforcement of that right.

The Horsham case looked into whether there was a contravention of Article 1 of the First Protocol to the European Convention of Human Rights which states that:

Every one natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law.

In considering Article 1 of the First Protocol, in the court Briggs J stated that:

although the equity of redemption is a 'possession' within the meaning of Article 1 of the First Protocol, the exercise of the statutory power of sale under s.101 of the 1925 Act, after a relevant default by the mortgagor, is not a 'deprivation' of possessions by state intervention within that Article.

Therefore, if the deprivation was not a result of state intervention then Article 1 of the First Protocol was not engaged and the issue of incompatibility with the ECHR

could not be considered. Briggs J further confirmed that the sale of the property was purely contractual:

Moreover, on a strict analysis of the facts of the case, the defendants had lost their equity of redemption without any state intervention because the equity of redemption had been overridden when the receivers contracted to sell the property pursuant to the purely contractual power conferred by the mortgage, rather than upon the subsequent transfer as agents for the mortgagee, pursuant to s 101.

The contractual aspect to the transaction confirmed that the case did not fall within Article 1 of the First Protocol. Briggs J stated that as GMAC sold the property under s.101 of the Law of Property Act 1925, then this may have resulted in the opposite decision.

When considering this, the court looked at *Kay and Others v London Borough of Lambent*, *Leeds City Council v Price*, where the House of Lords sought to clarify the application of Article 8 of the European Convention of Human Rights in respect of domestic mortgage possession proceedings.

Article 8 states that:

Everyone has the right to respect of his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights or freedoms of others.

An Article 8 defence will generally not assist a mortgagor in resisting an order for possession, because, according to *Wood v United Kingdom*, it is in accordance with the terms of the loan, the domestic law, and is necessary for the protection of the rights and freedom of others, namely the lender. This case was prior to the Human Rights Act in 1998, and it involved the applicant who had obtained a loan on the security of her house. The house was repossessed when she was unable to meet the repayments on the loan. She complained that her rights under Article 8 and Article 1 of the First Protocol had been breached.

Ordinarily, the procedure by which the County Court consider the application of the substantive law ensures practical compliance with the protections afforded by Article 8 and in practice, County Court judges should assume compliance. It is only in exceptional circumstances that a mortgagor is likely to be able to show a seriously arguable case that the law is incompatible with his Article 8 rights.

The House of Lords subsequently reaffirmed this approach following criticism from the Court of Appeal, which stated that the law simply was not clear, as in *Doherty v Birmingham City Council*. The appellant in this case was a gipsy who was subject to possession proceedings in respect of his pitch on a caravan site, which he held under a license. The appellant claimed that s. 5(1) Mobile Homes Act 1983, which

had the effect of excluding from the protection of the Act land occupied by a local authority as a caravan site for gypsies, was incompatible with his Convention rights. The House of Lords confirmed that County Courts should apply the principles set out in *Kay v Lambeth LBC* in deciding whether or not a defendant has a defence under Article 8 of the European Convention of Human Rights. If the defendant has no legal or equitable right to remain in possession, then he has no defence unless one of the two ways apply as Lord Hope stated in this case , which are:

- (i) There is a seriously arguable challenge to the law itself under Article 8
- or
- (ii) On public law grounds that the decision was 'unreasonable'.

The Court of Appeal subsequently gave further guidance on the application of *Doherty* and the defences under gateway (b) in *Doran v Liverpool City Council*. It widened in *Doran* such that the personal circumstances and history of occupation of Mrs Doran were factors that should be considered both by the Council in deciding to issue a Notice to Quit, and by the Court in considering whether the Council's decision was one that a reasonable person would consider justified. On the facts of Mrs Doran's circumstances it was determined that there was an arguable public law defence and the matter should be remitted to the County Court to hear the defence once the summary judgment was set aside. It was also stated in this case that there would be breaches of Articles 6, 8 and/or 14 if the matter were not remitted.

However, to an extent, this may now be read in the light of the recent Supreme Court decision in *Manchester City Council v Pinnock*. The case concerned possession proceedings brought by a local authority, therefore it would be difficult to apply directly to a mortgage case such a case would also need to satisfy Article 1 of the First Protocol. However, it was held that in order to ensure that domestic law was compatible with Article 8, a court should consider whether it is proportionate to make the order and for that purpose it should be able to investigate and determine any issues of fact. This may extend beyond possession proceedings brought by public authorities, and if this did, then this could arguably apply to mortgages. The Supreme Court did, however, acknowledge that the European Court of Human Rights was of the view that only in exceptional cases will Article 8 proportionality give a right to continued possession. This is where the applicant has no right under domestic law to remain as shown in *McCann v United Kingdom* and *Kay v United Kingdom*.

In *Horsham*, Briggs J held:

that there was no obligation by the mortgagee to seek an order from the court before taking action to dispossess householders in default of paying their mortgages out of their homes and selling the home. He confirmed that the claimants were entitled to the property and the law was not incompatible with Article 1 of the First Protocol.

He further confirmed that the mortgagee was also entitled to the property and used the decision in *Ropaigealach v Barclays Bank* to confirm this. This case stated that,

on a default by a mortgagor, a lender might well exercise his power of sale without first actually taking possession of the property. This decision caused conflict with the Administration of Justice Act 1970, s 36 which, in relevant circumstances gives the mortgagor reasonable time to pay and the court discretion to suspend, or postpone the date of delivery of possession, adjourn the proceedings, stay or suspend judgment. However, the Court's view in this case discourages this, thus permitting the mortgagees to repossess without a court order and LPA, s 101 as not incompatible with the HRA 1998.

Both cases left a loophole in the system in respect of the s. 36 offering protection to the mortgagor.¹³⁵ Currently there is nothing in legislation which gives greater protection to the mortgagor. They are still at the mercy of the lender, although currently there are Government Initiatives in place which assist a mortgagor in arrears. There is also the risk that the decision in *Horsham* allows mortgagees in certain instances to continue with their unscrupulous behavior towards the vulnerable mortgagor. The result of *Horsham* has not really brought any significant change to date. Briggs J clearly stated that 'if there was to be any radical change in the law then this had to come from Parliament.'¹³⁶ Since the *Horsham* decision, there is still concern that no independent legal advice is available to the mortgagor at the mortgage application stage. Such actions could evidently serve to lessen the

¹³⁵ Jack Straw commented on the decision in *Horsham*, stating that it left a 'legal loophole in the system,' *The Times* November 11 2008.

¹³⁶ *Ibid* para 45.

confidence the public have in legislation. Such legislation is to act as guidance to the judges.

2.5 Consumer Protection

2.5.1 Consumer Credit Act

Mortgages that are not regulated would fall under The Consumer Credit Act 1974 as amended by the Consumer Credit Act 2006.¹³⁷ This Act gives the court powers where there has been an unfair relationship between creditors and debtors.¹³⁸ The court has authority to vary the terms of the agreement resulting in the creditor to repay, reduce or discharge any sum payable or set aside any duty in the agreement that has been imposed by the debtor.¹³⁹ Ultimately the court may require the creditor to 'do or not do (or cease doing) anything specified in the order in connection with the agreement.'¹⁴⁰

However the Act is more likely to apply to second mortgages and short-term transactions and is therefore outside the focus of this research.

2.5.2 Financial Services and Market Act 2000

The Financial Services and Markets Act 2000 applies to regulated mortgage

¹³⁷ Mortgages that are regulated by the FSA, are excluded from regulation under 1974 Act.

¹³⁸ CCA 1974,s 140 A (1) as introduced by CCA 2006, s19.

¹³⁹ CCA 1974,s 140 B (1) as introduced by CCA 2006.

¹⁴⁰ CCA 1974,s 140 B (1) (b).

contracts from 31 October 2004.

Regulated mortgage contracts are defined by the Financial Services and Markets Act 2000(Regulated) Order 2001.¹⁴¹ Under Article 61:

- (a) A contract is a 'regulated mortgage contract' if, at the time it is entered into, the following conditions are met-
 - (i) The contract is one under which a person ('the lender') provides credit to an individual or to trustees ('the borrower');
 - (ii) The contract provides for the obligation of the borrower to repay to be secured by a first legal mortgage on land (other than timeshare accommodation in the United Kingdom.
 - (iii) At least 40% of that land is used, or is intended to be used, as or in connection with a dwelling by the borrower or (in the case of credit provided to trustees) by an individual who is a beneficiary of the trust, or by a related person.

The FSA therefore covers most home purchase plans that are secured by first legal charge over the borrower's home.¹⁴² Alternatively during the course of the mortgage the mortgagor has access to the Financial Services Ombudsman (FSO) if their complaint has not been satisfactorily resolved by the mortgagee, as stipulated under Pt. XVI of the Financial Service Market Act 2000 (FSMA). The FSO may request further information from the lender in order to consider the complaint.

This is a method whereby the mortgagor may avoid court action. However, court action is still available to them if they are not satisfied with the Financial Service

¹⁴¹ SI 2001/544.

¹⁴² Mortgages, are not regulated under the Financial Services and Markets Act 2000.

Ombudsman's decision.

One of the FSA's regulatory objectives was to 'protect the interest of the consumers.'¹⁴³ Each lender must be authorised by the FSA now known as the FCA before providing a mortgage. If no such authorisation is sought, then any agreement entered into between the mortgagor and mortgagee is void and the financial institution is guilty of an offence. This may lead to the mortgagee being prosecuted and entitle the mortgagor to bring a claim for compensation.

The Financial Service Authority was replaced by the Financial Conduct Authority in April 2013 as regulator, who aim to:

regulate firms and financial advisers so that markets and financial systems remain sound, stable and resilient ...encourage transparent pricing that's easy for everyone to understand ...and to help firms put the interests of their customers and the integrity of the market at the core of what they do.¹⁴⁴

Prior to the FCA, the FSA has also had an active involvement in the state of current repossessions. In 2009, there was a clear message from the FSA. Jon Pain, FSA retail managing director, said in a letter to all mortgage lender chief executives:

Conditions in the mortgage market are difficult and it seems likely that these conditions will persist for some time. In such a challenging operating environment it is particularly important for senior management to ensure the

¹⁴³ Financial Services and Markets Act 2000, s 2(2)(c).

¹⁴⁴ <www.fca.org.uk/about> accessed 10 May 2013.

fair treatment of customers, including when they go into arrears.¹⁴⁵

He continued:

The fair treatment of consumers in arrears will continue to be a priority for the FSA throughout 2009. Where we find that lenders are not complying with our requirements we will make appropriate and properly targeted use of our existing regulatory tools, which may include enforcement action.

The letter states that the FSA expects the senior management of mortgage lenders and administrators to:

- Critically review current arrears policy;
- Critically review current management practices and procedures;
- Assess whether, in practice, borrowers in arrears are being treated fairly by initiating a review of a sample of cases to assess whether the FSA's requirements are being met.

Although this support was clear in 2009, there was no further comments in 2010. It is questionable whether such support from the FSA still existed in 2010.

However, in October 2011, the FSA made a further contribution. They published the Forbearance and Impairment Provisions for mortgages.¹⁴⁶ These guidelines, outline what is expected from lenders as a reminder. It listed good and poor practice, aiming for mortgagees to comply with their requirements that are detailed in the FSA

¹⁴⁵ <www.fsa.gov.uk/static/pubs/ceo/arrears_repossession.pdf> accessed 10 July 2012.

¹⁴⁶ <www.fsa.gov.uk/pubs/guidance/fg11_15.pdf> accessed 10 July 2012.

Handbook which are as follows:

Good practice: The marketing position of properties in possession is reviewed on a frequent basis with the aim of striking a balance between achieving the best possible price for the property against the costs the customer is incurring while waiting for a sale. Auctions are avoided where other methods of selling would realise a better price.

Poor practice: Proceeds from sales of properties in possession are not distributed to the customer or other relevant parties promptly following the sale.

In December 2011, the FSA issued its consultation paper entitled, 'Mortgage Market Review: proposed package of reforms'.¹⁴⁷ This paper provides a summary of responsible lending, interest only mortgages, arrears management, equity release mortgages and sale and rent back, which are all relatively new topics in the mortgage repossession.

Further to this, in January 2012 the FSA produced a further guidance document which was headed, 'Unfair Contract Terms: Improving Standards in Consumer Contracts'.¹⁴⁸ This looks at unfair terms and such other issues.¹⁴⁹ During January 2012, the FSA also reviewed the sale and rent back market. In this review, twenty two lenders were assessed, from which the FSA identified poor practice. The general concern was that sale and rent back was either unaffordable or inappropriate.¹⁵⁰ This resulted in five lenders having to discontinue this product.

¹⁴⁷ <www.fsa.gov.uk/library/policy/cp/2011/11_31.shtml> accessed 10 July 2012.

¹⁴⁸ <www.fsa.gov.uk/static/pubs/guidance/fg12_02.pdf> accessed 10 July 2012.

¹⁴⁹ <www.fsa.gov.uk/static/pubs/guidance/fg12_02.pdf> accessed 10 July 2012.

¹⁵⁰ <www.fsa.org.uk/static/documents/guidance.../fsa-gc12-02.pdf> accessed 10 July 2012.

There is a need for regulation at the point that the mortgage is created rather than at the point of remedy when repossession is sought. The Financial Services Regulation role as a regulatory agency is failing resulting in systematic problems due to customer inadequacy rather than the basic model of the Financial Services Regulation which does not allow for systematic failure. It is in fact the failure of the consumer inadequacy in the market that has led to the need for the forthcoming EU Directive. The FSA has declared that the market failure paradigm represents the intellectual underpinning of its regulatory policy-making in the financial services arena and is deeply flawed.¹⁵¹

Harry Mcvea¹⁵² further states that:

'Many of the FSA's existing rules are both useful and desirable, since they undoubtedly provide important protections for consumers which, as citizens, we would endorse. For example, as citizens (and as consumers, too) we are apt to welcome the idea of firms being subject to strict vetting, or authorisation, requirements. Similarly, as citizens we are apt to welcome the idea that firms should be under an obligation to give 'suitable' advice, or that certain minimum disclosures should be a pre-condition of the service provider being allowed to engage in certain types of business with us. However, my critique does at the very least imply the need for a paradigm shift in regulatory policy making: a move away from the sham certainty of market failure (and its accompanying conceptual apparatus of cost-benefit analysis) to a more complex and textured approach, one which acknowledges that financial services regulation properly understood is—and should be—about more than the sum of our consumer interests. A theory of financial services regulation which is rooted in citizenship offers an alternative, and no less valid, means of characterising and justifying regulation in a liberal democracy. In this respect, dislodging the FSA's rhetoric of market failure and cost-benefit analysis is

¹⁵¹ Harry Mcvea, 'Financial Services Regulation Under the Financial Services Authority: A Reassertion of the Market Failure Thesis?' –Cambridge. Law Journal., 64 [2005], pp 413–448.

¹⁵² (n147).

crucially important since the way in which we conceptualise financial services regulation today, and the language which we use to convey this understanding, will determine what problems we perceive and how we should respond to them in the future.'

His article highlights the market failure thesis which has become as he states 'an accepted part of FSA regulatory policy.'¹⁵³ The forthcoming EU Directive is hoped to combat such failure as it will be 'concerned with setting the minimum regulatory requirements that member states are required to meet in order to protect consumers taking out credit agreements relating to residential property. This captures residential mortgages secured against the borrower's home and also any other lending where the purpose is to acquire or retain property rights.'¹⁵⁴ The Directive proposes further changes to both the FCA Mortgage Regulation and Financial and Services Act 2000.

The key areas that the Directive addresses are as follows:

'mortgage firms act fairly and professionally, and that their staff have an appropriate level of knowledge and competence

advertising of products is fair and not misleading, with certain standard information included where specific rates are being quoted

certain information is provided to the consumer ahead of a contract being concluded

lenders conduct an affordability test, looking at customers' income and expenditure, to determine whether they can afford the mortgage loan

minimum standards are followed where advice is provided to consumers

lenders put in place additional consumer safeguards where loans are in a foreign

¹⁵³ (n147).

¹⁵⁴ <www.gov.uk/government/consultations/implementation-of-the-eu-mortgage-credit-directive/implementation-of-the-eu-mortgage-credit-directive> accessed on 1 August 2014.

currency, to protect the customer against exchange rate risk

consumers are given a right to be able to exit a mortgage before it reaches the end of the term

lenders exercise reasonable forbearance to customers in payment difficulties before initiating repossession proceedings

it is easier for mortgage intermediaries to operate across borders

consumers have access to cross-border redress'

The UK is required to implement the MCD requirements by 21 March 2016, in order to meet its Treaty obligations. This requires the UK government to make changes to the legislation that enables mortgage regulation in order to meet the requirements set out in the MCD.¹⁵⁵

There have also been non-legal contributions to the area of Mortgage Repossession for the benefit of the mortgagor such as the Pre-Action Protocol, Law Society's Practice Note and various Government Initiatives to assist struggling homeowners.

In October 2011 the CML amended its guidance on arrears and possessions in order to reinforce MCOB s13. Also in November 2011 the CML, together with the National Housing Federation, produced further guidance on repossessions in shared ownership property,¹⁵⁶ where the principal issue was effective communication

¹⁵⁵ www.gov.uk/government/consultations/implementation-of-the-eu-mortgage-credit-directive/implementation-of-the-eu-mortgage-credit-directive#introduction accessed on 21 April 2015.

¹⁵⁶ <www.cml.org.uk/cml/policy/guidance> accessed 10 July 2012.

between the lender and the Housing Association.

2.5.3 The Pre-Action Protocol

A Pre-action Protocol is not law, however, it is a statement of best practice about pre-action conduct which has been approved by the Head of Civil Justice. Such protocols aim resolve disputes without going to court. In addition, home-owners facing mortgage repayment problems can benefit from a number of measures introduced by the Government.

The Pre-Action Protocol for Possession Claims Based on Mortgage of Home Purchase Plan Arrears in Respect of Residential Property, which was developed by the Civil Justice Council and approved by the Master of the Rolls, was introduced in November 2008.¹⁵⁷ The Protocol was issued due to the recent rise of mortgage repossessions and aimed to reform the repossession process. The Protocol's aim is to incorporate the provisions in the FSA: Mortgage Conduct of Business (MCOB) ¹⁵⁸ by introducing pre-action communication between the mortgagor and mortgagee which is signed to ensure that each party acts 'fairly and reasonably'.

The new Protocol requires and encourages active communication between

¹⁵⁷ <www.justice.gov.uk/civil/procrulesfin/contents/protocols/prot.mha.htm> accessed 10 June 2012.

¹⁵⁸ <www/fsahandbook.info/fsa/html/handbook/MCOB> accessed 10 June 2012.

mortgagees and mortgagors with a view to resolving their financial difficulties.

Paragraph two provides that:

- (i) lenders and borrowers to act fairly and reasonably with each other and resolve disputes over any matter concerning mortgage or home purchase plan arrears.
- (ii) more pre-action contact between lenders and borrowers to seek agreement so that if court proceedings become necessary, the court's time and resources may be used efficiently.

It states clear guidance on the steps that lenders are expected to take before going to court and makes clear that applying for repossession must always be the last resort.

The aims of the earlier Protocol had been considered in a consultation paper published by the Civil Justice Council in April 2000. In this consultation paper, it was proposed that an obligation should be imposed on the mortgagee to assist the mortgagor with claiming welfare benefits, a principle which was heavily criticised.¹⁵⁹

The Civil Justice Council confirmed:

although regulatory regimes do exist to cover all sectors of mortgage lending, regulations are not best placed to monitor compliance and introduction of the Protocol will provide the courts with the means of assessing whether the lender is in compliance with the expected regulatory standards at the point where an application

¹⁵⁹ Mortgage Arrears Protocol Response to Civil Justice Council Consultation Paper by Council of their Majesty's Circuit Judge's April 2008. This is favourable to the mortgagor who would no doubt welcome such a suggestion in financial difficulty but it is a questionable whether the mortgagee should give such advice as they are not welfare benefit specialists and this is better left to the Citizens Advice Bureau Foreclosure. The mortgagor is left in a situation, where they will need to utilise the services offered by such voluntary organisations to assist them with their financial affairs 'Civil Justice Council, 'Consultation Paper: Mortgage Arrears Protocol' (29 February 2008) at <www.civilprotocol-final290208.pdf> accessed 10 March 2013.

for a possession order is made. There is concern that despite such a Protocol being in place, the mortgagee's rights still prevail.

In effect, the Protocol ultimately, in part at least, shifts the compliance away from the regulators and towards the judges. On the other hand, the Protocol seems to significantly emphasise fairness. This could be portrayed a denial of the mortgagees statutory interests. The Protocol aims to achieve the reduction of correspondence and telephone contact and wants each party to communicate face to face. The practicalities of face to face communication may prove challenging, and in such a situation, a mediator may prove more effective.

The Protocol seeks to promote use of the Alternative Dispute Mechanisms, as it states:

before any proceedings are commenced all reasonable steps are taken to avoid the necessity for litigation and information about the prospective legal claim; to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings, and to support the efficient management of proceedings where litigation cannot be avoided.

In addition, the Protocol allows court action to be postponed if the mortgagor has reached an agreement with the mortgagee.¹⁶⁰ One may question whether the provisions are necessary, as they do repeat the existing provisions already in the MCOB. However, it may be hoped that repetition will reinforce such best practice, as there is evidence that lenders have failed to comply with the requirements of the

¹⁶⁰ MCOB 13 offers guidance specifically on arrears and repossessions. The Protocol has many similarities to the provision in the MCOB.

MCOB, together with the lack of regulation by the FSA.¹⁶¹

The implementation of such a Protocol has been welcomed by voluntary organisations such as Shelter and The Citizens Advice Bureau.¹⁶² They see the Pre-action Protocol as a way forward for mortgagors who are in default and facing the repossession of their home. Such co-operation between the mortgagor and mortgagee will, it is hoped, reduce the amount of cases being brought before them.¹⁶³

The Protocol excludes Home Purchase Plans and bankruptcy proceedings. It merely covers mortgages that were regulated by the FSA under the Consumer Credit Act. McAuslan,¹⁶⁴ described the Protocol as 'a complete waste of time and paper and stated that it lacked teeth.'¹⁶⁵

The Protocol was also criticised for not providing any additional protection to the mortgagor's rights and obligations as it 'seeks merely to encourage rather than

¹⁶¹ <[www/fsahandbook.info/fsa/html/handbook/MCOB](http://fsahandbook.info/fsa/html/handbook/MCOB)> accessed 10 June 2012.

¹⁶² <www.england.shelter.org.uk/__data/assets/pdf_file/0008/69542/05-08_CJC_Mortgage_Arrears_Protocol.pdf> accessed 10 June 2012 and <www.england.shelter.org.uk/__data/assets/pdf_file/0008/69542/05-08_CJC_Mortgage_Arrears_Protocol.pdf> accessed 10 June 2012.

¹⁶³ Citizens Advice, 'Mortgage Arrears Protocol: Response by Citizens Advice to the Civil Justice Council (May 2008) 4-5 at <www.citizensadvice.org.uk/index/campaigns/policy_campaign_publications/consultations_responses/cr_consumeranddeb/mortgagearrears.protocol> accessed 10 March 2013.

¹⁶⁴ 'Mortgage arrears: the repossession crunch' (2009) 24 (3) Journal of International Banking and Financial Law 13.

¹⁶⁵ 'Mortgage repossession: Pre -action Protocol has no teeth says solicitor (ed) (2008) S J (152/47) 5.

compel lenders to view repossessions as a last resort.¹⁶⁶ As with any Protocol, if it appears to be used consistently by the parties involved, then it will serve its purpose. However, without such consistency, usage and relevance, it may constitute nothing more than 'an opportunity lost.'¹⁶⁷

In comparison to the Protocol, s 36 of the AJA does address some of the issues affecting mortgagors who are in arrears. For example, the Courts interpreted and applied its provisions made by the Court of Appeal about what is a reasonable period over which to pay mortgage arrears. However the Protocol does not deal with situations where mortgagees may enforce their security by other means than repossession proceedings, such as by appointing a receiver or exercising a contractual power of sale.

The Citizens Advice Bureau findings were that 'lenders have taken mortgagors to court without exploring all the other options available to address the arrears. This is resulting in excessive costs, stress and worry for mortgagors which could have been avoided if lenders had acted in accordance with the rules that govern arrears management conduct.'¹⁶⁸ This was the case when the FSA conducted their own review of the arrears management practices of regulated mortgagees. One of the

¹⁶⁶ Lisa Whitehouse 'The Mortgage Arrears Pre-Action Protocol': An Opportunity Lost; (2009) Modern Law Review Vol 72 793.

¹⁶⁷ Ibid.

¹⁶⁸ Citizens Advice 'Mortgage Arrears Protocol: Response by Citizens Advice to the Civil Justice Council' (May 2008), 4-5 at <www.citizensadvice.org.uk/index/campaigns/policy/campaign_publications/consultations-responses/cr.consumer_and_debt/mortgage_arrears_protocol> accessed 5 March 2012.

results of the research was that there was often an unwillingness by the lender to consider options such as a payment holiday or capitalising the arrears.

Neither were the views from respondents considered. This evidenced the failure by many mortgagees to comply with the requirements of MCOB, and, if this has been the case, then a repetition of this is likely to take place with the Protocol. However, the difference being is that compliance with the Protocol will be monitored by District Judges in every possession application case, which in effect eliminate any future loopholes.

A balance needs to be struck between the protection offered to the mortgagor and mortgagee by the Pre-action Protocol. The Protocol weakens the mortgagee's protection and this could result in the mortgagees being more cautious in advancing monies. The CML have confirmed that this 'would have severe consequences for the lending industry and therefore for mortgagors and for the economy as a whole.'¹⁶⁹

2.5.4 Law Society's Practice Note

¹⁶⁹ Council of Mortgage Lenders, 'Mortgage Remedies (Possession and Sale) Review Response by the Council of Mortgage Lenders to the Ministry of Justice's Initial Review' (14 January 2009) at <www.cml.org.uk/cml/filegrab/MortgageReviewQuestionsforStakeholdersdraftresponse-FINAL.pdf?ref=6248> accessed the 10 March 2013.

In addition to the Protocol, the Law Society issued three Practice Notes, one on the 15 January 2009 and the second on 4 June 2009 and the third on the 13 February 2009 on mortgage repossession.¹⁷⁰ The Notes were updated in October 2011. The Practice Note is aimed at solicitors whose clients are in mortgage arrears and face repossession of their homes. The Law Society published the Practice Notes in light of certain shortcomings of the Pre-Action Protocol.¹⁷¹

The Practice Note summarises the Protocol's purpose and main requirements. It also identifies its shortcomings, and advises solicitors how to:

- (i) Check whether a lender, who issues possession proceedings, is complying with the Protocol.
- (ii) Counsel clients if a lender bypasses possession proceedings and appoints a Receiver.

This Practice Note acts as guidance to the legal practitioner who is acting for the mortgagor once the mortgagee has started to request that the arrears are paid.

¹⁷⁰ <www.law.society.org.uk/memberservices/PracticeNotes> Accessed 5 March 2012. Solicitors should always consult the online version of the Law Society practice note, as it seems it will be updated over time.

¹⁷¹ For Possession Claims based on Mortgage or Home Purchase Plan Arrears in respect of Residential Property (Protocol) published by the Civil Justice Council and which came into force on 19 November 2008 (see Legal update, Mortgage repossession Pre-action Protocol applies from 19 November 2008). <www.law.society.co.uk/protocol> accessed 6 March 2012.

Although on 24 November 2008, major lenders agreed with the Government that lenders would not commence possession proceedings unless the Mortgagor was three months in arrears. The legal practitioner is able to use this Practice Note as a checklist to ensure that the mortgagee is complying with the Protocol. In addition, the three months requirement should allow all parties sufficient time to comply with the Protocol.

2.5.5 Government Initiatives

Certain government initiatives¹⁷² were also introduced following the decision of Horsham.¹⁷³

The initiatives introduced by the Government were as follows:

(i) There were changes in eligibility criteria for Income Support Mortgage Interest for homeowners getting Income Support, Income-based Jobseeker's Allowance, Income-related Employment and Support Allowance or Pension Credit. Where they have a mortgage, those benefits may include an additional element called Income Support for Mortgage Interest, which assists the homeowner with the interest on their mortgage, became available in January 2009. It becomes available after 13 weeks, previously changed from 39 weeks.

(ii) The Mortgage Rescue Scheme was introduced for homeowners who would be

¹⁷² <www.civil.org.uk/civil/policy/issues/4707> accessed 12 February 2012.

¹⁷³ Further to these initiatives the CML issued a statement in January 2009 where they voluntarily confirmed that its members would not seek to sell a mortgaged property without first obtaining an order for possession and agreed with the Government a minimum of three months before the sought to repossess.

eligible for help under homelessness legislation from their local authority if their home was repossessed. There have been various mortgage help schemes that have been set up for all parts of the England.¹⁷⁴ This rescue gives criteria and options available to the mortgagors with a view of securing their home.

However there is a fairly demanding eligibility criteria, as the scheme has been set up for the most vulnerable. It will only be available to households earning less than £60,000 per annum whose home is worth less than £140,000 and for the principal home. It was set up for households who are classed as a priority for housing such as homelessness, such as families or people who are vulnerable as a result of old age, mental illness or physical disability. It is available where the level of reverse debt mortgage and secured loans exceeds the estimated value of the property by up to twenty per cent. Mortgage rescue was operated by housing associations working in partnership with their local authority. The scheme will formally end in Spring 2014 as the current Government decided that it was too expensive to deliver and it was recently announced and that the London councils will not utilise the scheme.¹⁷⁵ This in effect will mean that such a decision could mean that existing and future mortgagors in arrears could risk losing their home.

¹⁷⁴ In particular the following website provides information for the Sheffield area <[www.sheffield.gov.uk/inyour area/housing services/homeless and housing options/mortgage rescue](http://www.sheffield.gov.uk/inyour%20area/housing%20services/homeless%20and%20housing%20options/mortgage%20rescue)> accessed 12 September 2012.

¹⁷⁵ Hilary Osborne 'London councils scrap mortgage rescue scheme ahead of schedule' The Guardian (23 November 2013) <www.theguardian.com/money/2013/nov/23/london-councils-scrap-mortgage-rescue-scheme> accessed 18 January 2013.

(iii) Also, at that the same time when the Mortgage Scheme was launched, the Registered Social Landlords Scheme (RSL) gave the mortgagor the option to either enter into shared equity schemes or the RSL cleared the outstanding mortgage and the mortgagor become a tenant of the RSL. They suggested two ways in which vulnerable households may be helped:

- Shared Equity: The partner housing association will provide an equity loan so the householder's mortgage repayment can be reduced. The householder would continue to pay a mortgage plus a small payment to the Housing Association.
- Government Mortgage to Rent: The housing association would clear the secured debt completely and the applicant would pay rent to the Housing Association as a tenant. This scheme further allowed mortgagors to suspend their mortgage interest payments in order to gain control of their finances.

(iv) The Homeowner Mortgage Support Scheme enables eligible mortgagors to reduce their monthly mortgage interest payments to affordable levels for up to two years, helping them get back on track with their finances if they suffer a temporary loss of income.

(v) The Housing Possession Court Duty Scheme, is where duty legal advisers are available to advise anyone, regardless of income and have a hearing listed in court on that day.

There has also been heavy criticism of the Government initiatives on the basis that they have had little success in assisting mortgagors despite the funds being available. The Daily Telegraph suggested that only 16 mortgagors had been assisted.¹⁷⁶ However in fact a total of 4,413 families have been given rescue packages since 2009.¹⁷⁷ The inadequacy of such measures were evaluated in the research by the Department of Work and Pensions under the title of: An Evaluation of the January 2009 and October 2010 arrangements for Support for Mortgage Interest: the role of lenders. Money advice services, Job Centre Plus and policy Stakeholders.¹⁷⁸

This may be the direct result of the strict criteria in assessing applications which followed. Following suggestions concerning the inadequacies of the Government Initiatives, the Government undertook an evaluation of their support initiatives in May 2011.¹⁷⁹ They concluded that the support was helpful but there still remains the question whether there was adequate practical assistance to mortgagors. Despite the Government's efforts, mortgagees are not keen to delay matters as arrears increase. There is a clear conflict between the Government and lender. There is no harmony between the two, and without this, ultimately the mortgagor will suffer the consequences. This illustrates that the Government does not have any significant control over the lender's decisions. The Government can offer endless assistance,

¹⁷⁶ Daily Telegraph 1 July 2009 and 10 December 2009.

¹⁷⁷ <www.nao.org.uk/report/the-mortgage-rescue-scheme/> accessed 20 January 2014.

¹⁷⁸ <www.research.dwp.gov.uk> accessed 31 December 2013.

¹⁷⁹ <www.research.dwp.gov.uk/asd/asd5/rports2011-2012/rrep740.pdf> accessed 31 December 2013.

however this will not be of any use unless the lender is willing to consider them. Although there has been talk of legislative change, until this materialises the courts will be required to deal with the inconsistencies which could potentially be easily solved if there was adequate legislation in place.

The UK needed to respond to the global recession and resulting economic crisis,¹⁸⁰ which originated from the USA. This has put the UK's economy under certain consequences, one consequence of which has been pressure and brought about an increase of mortgage repossessions in recent years, ultimately this has led to a succession of suggested law reforms. Within these reforms, the law's overriding objective is been to achieve an appropriate balance between the mortgagee's interest and the mortgagor's protection.

¹⁸⁰ Patrick Kingsley 'Financial crisis:timeline' <www.theguardian.com/business/2012/aug/07/credit-crunch-boom-bust-timeline> The Guardian (7 August 2012) accessed 16 January 2014.

CHAPTER 3

THE RIGHTS OF THE OCCUPIER

However, nowadays mortgages are often also being used as security for a loan not directly connected with the acquisition of property, whether that may be for personal or business uses,¹⁸¹ which may mean that there are additional parties to consider.

For example, in *Williams Glyn's Bank Limited v Boland*,¹⁸² the house was in the sole name of the husband who took a mortgage to fund his business. He defaulted on the mortgage and it was held by the House of Lords that the wife had an equitable interest in the house coupled with the fact that she was in actual occupation of it, which meant that she has an overriding interest and the Bank was not entitled to possession. The decision in *Boland* added pressure on conveyancers, who were required to make more checks on who else would be occupying the property with the mortgage applicant. Even with such checks in place, there is still the risk that the mortgagee may not be aware of such occupancy or contribution to the purchase price. This has been reinforced recently by the introduction of the Law Society Protocol.¹⁸³ The rights of the occupier concerned were raised and subsequently

¹⁸¹ See *CIBC Mortgages plc v Pitt* [1994] 1 AC 200 and *Williams & Glyn's Bank v Boland* [1981] AC 487 and *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at [34] per Nicholls of Birkenhead.

¹⁸² [1981] AC 487.

¹⁸³ Stage A Instructions 7 page 8.

taken up by the Law Commission who recommended that the decision in *Boland* be reversed by legislation. This would ensure that the interest of a beneficial co-owner should only bind a purchaser, including of course a mortgagee, if it was protected by registration.¹⁸⁴

The Bill that followed was the Land Registration Act and Law of Property Bill 1985 (which was not enacted), confirmed that the beneficial interest of a wife who was in actual occupation of the house would continue to take effect as an overriding interest unless she has consented to the mortgage, whereas if the occupier was not married to the legal owner, the same interest would only bind a mortgagee if it was registered. There is a degree of discrimination between married and unmarried couples, which seems outdated. If enacted it may create further loopholes in the law.

However, recent case law has clarified the position in *Boland*, with the intention of striking a fair balance between mortgagees and additional occupiers. But the issue at hand is that the mortgagee potentially has to share their interest if they were lending to a sole applicant who had an occupier living with them with an interest under an implied trust. Unless of course the occupier has confirmed in writing that any contribution of funds towards the purchase is purely for gift purposes, meaning

¹⁸⁴ 1982 Law Commission No 115.

that they do not wish for these funds to be repaid back to them and neither do they have any interest in the property.

Historically, like the rights of mortgagors, the rights of occupiers were under protected. Nevertheless, the *Ainsworth*¹⁸⁵ case passed a new threat towards the existing parties to a mortgage. The *Ainsworth* case resulted in the passing of The Matrimonial Homes Act 1967. This was replaced by the Family Law 1996, where s.31 of the Act gives non-owning spouses the statutory right to occupy the matrimonial home.

In accordance with this Act a spouse or civil partner is able to make mortgage payments in respect of the home¹⁸⁶ and subsequently is entitled to be made a party to any action brought by the mortgagee.¹⁸⁷ However, there were still mixed judicial reactions to the occupiers rights and also concern of whether the occupier, mainly the wife knowing that she must protect her interest. Despite an attempt to protect the occupier, the wife was not being adequately protected when her husband mortgaged the house without consulting her.

¹⁸⁵ *National Provincial Bank Limited v Ainsworth* [1965] AC 1175.

¹⁸⁶ Family Law Act 1996, s 30(3).

¹⁸⁷ The court must be satisfied that this may affect the outcome: Family Law Act 1996, s 55.

The landmark case of equitable ownership and overriding interests was *Williams & Glyn's Bank Limited v Boland*.¹⁸⁸ In this case, Mr Boland was the sole proprietor of the matrimonial home which he shared with his wife. In an attempt to save his business indebtedness he mortgaged the matrimonial home. The Bank made no enquires concerning Mrs Boland's occupancy. On default, the Bank sought possession and Mrs Boland claimed to have an overriding interest binding on the Bank.

The case was decided by the House of Lords in favour of Mrs Boland as the House of Lords held that the wife had an equitable interest in the house coupled with the fact that she was in actual occupation of it, which meant that she has an overriding interest and the Bank was not entitled to possession. The decision therefore opened new questions. The concerns centered around the mortgagees, existing mortgages and also for future mortgage applications. In either instances, the mortgagee required assurance that no such interest would weaken their security.

The case of *Bristol and West Building Society v Henning*¹⁸⁹ following the *Boland* case reaffirmed the mortgagee's position where as in this case it was held that the unmarried spouse's equitable ownership did not prevail over the Society's interest due to the wife knowing that the house was being mortgaged. Therefore the

¹⁸⁸ [1981] AC 487.

¹⁸⁹ [1995] 1 W L R 778.

mortgagee was entitled to take possession because the unmarried spouse could show no beneficial interest under a constructive trust. Also Henning never had the intention of giving her a beneficial interest, and without an express or imputed intention, it was impossible to create a common intention constructive trust.

In the case of *City of London Building Society v Flegg*,¹⁹⁰ the House of Lords were conscious about the existence of undisclosed occupiers. Lord Oliver commented that to decide in favour of the parents who held an equitable interest would lead to financial institutions being exposed to 'unsuspected hazards'. The result of this decision meant that there was now a conflict between the occupiers, that were not on the legal title and the ones that were and the mortgagee. In this case it was considered how a purchaser can take free of the occupier's rights. The process of 'overreaching' enables certain trust to be sold free of the beneficiaries' interest if the purchase price is paid to two trustees who hold the money in trust for the beneficiaries. In this case the mortgage money was paid to the legal owners who held the estate upon trust for themselves and the *Fleggs*. The *Flegg's* interest was overreached by that payment even though the beneficiaries were residing in the property at the date of the charge. The effect of the decision was to allow the mortgagee to get priority over the right of the *Flegg's* and sell the property free of their interests.

¹⁹⁰ [1988] A C 54.

3.1 Undue Influence

The only issues were now between the co-owners where undue influence or misrepresentation occurred by one co-owner in order to secure the other co-owner's signature to the other co-owners signature. Where the signature was secured by undue influence, the mortgage would not be enforceable on the latter¹⁹¹ or if the mortgagor was aware of the misrepresentation or undue influence.¹⁹²

However, there was drastic change in the law in relation to co-owners in *Barclays Bank v O'Brien*.¹⁹³ The case involved the issue of the co-owner who was an equitable owner in repossession. Mr O'Brien, owned a company and who took out a second mortgage using the family home as security. In doing so, he falsely told Mrs. O'Brien that the debt was limited to £60,000 and would be repaid within three weeks. Mrs O'Brien signed the documents without reading them and Barclays Bank did not advise her to take independent legal advice. When the debt reached £154,000, Barclays Bank sought to seek possession of the house with the intention of selling it to recover the outstanding mortgage monies. At this stage, Mrs. O'Brien claimed undue influence and misrepresentation. She stated that the mortgage should not be binding on her. Although the Court of Appeal were willing to consider, the wife's

¹⁹¹ *Kings North Trust Limited v Bell* [1986] 1 W L R 119; *Avon Finance Limited v Bridger* [1985] 2 All ER 281.

¹⁹² *Bank of Credit and Commerce International v Aboody* [1990] 1 QB 923.

¹⁹³ [1994] 1 A C 180. For an in depth discussion of the issues arising in this case, see Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience in English Law* (Oxford 1997).

interest to a minimum extent the House of Lords held the mortgage to be completely void against her.

A mortgage becomes void if the transaction has been misrepresented by one party to another. Lord Browne-Wilkinson in this case stated:

In a substantial proportion of marriage it is still the husband who has the business experience and the wife is willing to follow his advice without bringing a truly independent mind and will to bear on financial decisions... Such wives can reasonably look to the law for some protection when their husbands have abused the trust and confidence reposed in them.

On the other hand, it is important to keep a sense of balance in approaching these cases. It is easy to allow sympathy for the wife who is threatened with the loss of her home at the suit of a rich bank to obscure an important public interest viz., the need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile. If the rights secured to wives by the law renders vulnerable loans, granted on the security, thereby reducing the flow of loan capital to business enterprises. It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions.¹⁹⁴

Lord Browne-Wilkinson's statement outlines the main circumstance and the issue behind undue influence. Although he was sympathetic towards the wife who was unduly influenced by her husband's actions, he is also conscious about protecting the mortgagee's interest with a view to deterring such a defence.

¹⁹⁴ At 188.

Undue Influence deals with the way in which the agreement the mortgage was obtained.¹⁹⁵ The occupier is protected if the mortgage was obtained by means of undue influence. Undue Influence 'arises out of a relationship between two persons where one has acquired over another, a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage.'¹⁹⁶ There may be a specific instance whereby the occupier claims that the mortgage is void due to undue influence such as duress. Duress occurs where a mortgagor has been coerced or pressurized into the transaction. Lord Scarman defined duress in *The Universe*

*Sentine*¹⁹⁷ case as:

There must be pressure. The practical effect of which is compulsion or absence of choice. Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him.¹⁹⁸

There must be actual or presumed undue influence for a mortgage to be set aside.

Lord Nicholls explained this in the leading case of *Royal Bank of Scotland plc v*

Etridge.¹⁹⁹

Undue Influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has not set limits to the means properly employable for this purpose.

¹⁹⁵ See generally Mark Pavlowski and James Brown, *Undue Influence and the Family Home* (Cavendish 2002).

¹⁹⁶ *Royal Bank of Scotland plc v Etridge* (No 2) [2002] 2 AC 773 at [8] per Lord Nicholls of Birkenhead.

¹⁹⁷ [1983] 1 AC 366 [HL].

¹⁹⁸ At 400.

¹⁹⁹ (No 2) [2002] 2 AC.

The main question in this area is whether the person claiming undue influence did do 'with her eyes open so far as the basic elements of the transaction are concerned.'²⁰⁰ One possible method of eliminating such a defence in the future was raised in the case of *Royal Bank of Scotland v Etridge* which came after the *O'Brien* case. It outlined that lenders were not protecting themselves adequately from possible claims from third parties, such as the spouse. It was therefore decided that in every mortgage transaction which involved a second surety party, the lender must ensure that they are protected adequately from a possible claim from a second party. This suggestion was outlined in set guidelines known as the '*Etridge* Guidelines'.

The Guidelines in the case of *Etridge*, suggest that the mortgagee initially obtain the details of the legal practitioner who is acting for such a party. They must inform them that they intend to seek confirmation that the specified practitioner has advised all mortgagors of the implications of the proposed transaction.

This is a broad condition as it does not specifically apply to undue influence. In accordance with the guidelines, the mortgagee must insist that the additional mortgagor must instruct an independent legal practitioner to advise them only. The additional mortgagor will incur additional costs, but this way the mortgagee can eliminate any possible undue influence claim. The joint mortgagor must respond

²⁰⁰ *Royal Bank of Scotland plc v Etridge* (No.2) [2002] 2 A C 773 at Lord Nicholls at para 54.

before any further action is taken on the application.

Depending on what the response is, the mortgagee will proceed accordingly. The mortgagee has a duty to provide the legal practitioner with all the financial information, in order for the legal practitioner to advise his client accordingly. This mortgagee will need to seek the mortgagor's authority to send this confidential financial information to the legal practitioner that is acting for them. If they refuse, then the mortgagee will not proceed further. Any such refusal in itself looks suspicious at the outset and the guidelines are there to eliminate this.²⁰¹

The mortgagee will also forward any relevant information and meeting notes to the legal practitioner to aid them in advising the mortgagee and mortgagor. The legal practitioner is required to issue the mortgagee with a certificate which confirms that all the steps have been complied with.

The case of *Etridge* gives practical steps to the legal practitioner which will, in effect, decrease the amount of mortgages being set aside on the grounds of undue influence.²⁰² This judgment is favorable to mortgagees and protects their position if an undue influence action is brought against them. It is crucial that each and every mortgagee implements and ensure compliance with these guidelines, as without

²⁰¹ Lord Scott's judgment in *Etridge*, paras 189-190. See also Helene Pines Richman, 'The Etridge Mortgage Cases: A Review' (2001) 151 New Law Journal 1541.

²⁰² [2002] 2 AC 733, 63-69] per Lord Nicholls and 169-170, per Lord Scott.

implementation they face the risk of losing their battle against the mortgagor, who could successfully claim undue influence.

The *Etridge* Guidelines clearly put the onus on the mortgagor's legal practitioner. These Guidelines are an adequate measure of ensuring undue influence has not occurred however they do not completely eliminate it. This was reflected in the case of *National Westminster Bank v Amin*²⁰³ where the mortgagor could not speak English. The House of Lords ordered this case to be sent back for retrial as they were of the view that the Bank were aware that the mortgagors could not speak English. The guidelines in *Etridge* allow mortgagees to rely on their panel instead of dealing with litigation themselves. The panel solicitor's fees are paid by the mortgagors only, yet the panel solicitors provide advice to both the mortgagor and the mortgagee. Although this is a new requirement in the future if the mortgagee fails to comply with these new guidelines the legal practitioner has no reason to question such issues due to evidence of such information being received from the mortgagee in their initial instructions from the lender.

²⁰³ [2002] UKHL 9.

CHAPTER 4

THE REMEDIES OF THE MORTGAGEE

It has always been of great concern that lenders are always given the necessary protection in repossessions. The CML have stated that 'any shortfall in protection for the lenders would have severe consequences for the lending industry and therefore for borrowers and for the economy as a whole'.²⁰⁴

There are several remedies available to the mortgagee on the default of the mortgage. The mortgagee is not bound to pursue one particular remedy and is able to pursue several at the same time.²⁰⁵ This weakens the mortgagor's sense of security for their home. The remedies available on default to the mortgagee are as follows:

4.1 Sue under contract

A contractual right becomes apparent for the mortgagee as soon as the mortgagor

²⁰⁴ <www.cml.org.co.uk> accessed 12 June 2012.

²⁰⁵ See *Cheltenham and Gloucester v Grattidge* (1993) 25 HLR 454 *Cheltenham and Gloucester BS v Grant* [1994] 26 H.L.R. 703 at 708; *Cheltenham and Gloucester BS v Johnson* [1996] 73 P & C.R. 293 (Money Judgement sought in addition to order for possession).

misses a payment. This right is under contract unless the mortgagee has agreed to repay the arrears back in installments. Despite this lenient arrangement from the mortgagee, the mortgagee has the added protection of requesting the full amount from the mortgagor at any time to recover their debt in full subject to the express terms of the mortgage.

A mortgagee has certain rights if the mortgage is not repaid by the mortgagor as agreed contractually. This is specified by a provision in the mortgage deed. The mortgage deed is executed by the mortgagor. By executing the same the mortgagor agrees to repay the specified amount by a set date. This payment includes any accrued interest. This must be done by a set date, known as the legal date of redemption and if this passes the mortgagee has a valid claim on the contract for repayment of the amount due unless of course the mortgagee is in agreement to defer the payments for the mortgagor to settle in instalments. A contract is created by a mortgage and the mortgagee has the right to sue under contract on the date of repayment but not before.²⁰⁶ Although this is often not the best option, as the enforcement process can take some time. If it is apparent the mortgagor does not have any capital funds and is unable to repay the mortgage, this option may therefore be seen as a redundant option to pursue. Law of Property Act 1925 provides for additional remedies, as it is not appropriate to sue only for the monies

²⁰⁶ See *Boton v Buckenham* [1891] 1 Q B 278. A mortgagor's obligation to repay is presumed in the absence of express provision from the receipt of the loan: See *Sutton v Sutton* (1882) 22 Ch D 511 at 515. For the rebuttal of the presumption where the mortgagor's property was security for a loan to a third party, see *Fairmile Portfolio Management Limited v Davies Arnold Cooper* [1998] E.G. CIS 149.

due. As a mortgage involves capital and interest, various remedies are appropriate for each classification. One of the remedies available to the mortgagee is to sue under contract for the outstanding mortgage debt, including interest and costs. This was the case in *Vedelease Ltd v Cascabel Investments Limited*²⁰⁷ and in *Alliance & Leicester v Slayford*,²⁰⁸ where the mortgagor was sued successfully after the proprietary remedies proved ineffective. In this case, the mortgagee was unable to obtain an order for possession due to the mortgagor's wife having an equitable interest in the house. Therefore the mortgagee decided to sue on the mortgagor's personal covenant to repay, which would lead to the mortgagor becoming bankrupt.

The Trustee in Bankruptcy could then apply for the sale of the house under s.14 of the Trusts of Land and Appointment of Trustees Act 1996. However, the mortgagee would lose priority over the unsecured creditors but it would mean they would get some money back. If there are no other creditors, then this will not be an issue. But where there is a conflict between the contractual and proprietary interest, it is then for the courts to assess which remedy will take precedence the contractual or proprietary, as in *Jones v Morgan*.²⁰⁹

There are some rights which benefit both the mortgagor and mortgagee. One of such rights is to redeem the mortgaged property. The mortgagor has the right to redeem

²⁰⁷ [1982] AC 584.

²⁰⁸ [2000] All ER (D) 1376.

²⁰⁹ (2001) EWCA Civ 995.

partially or in full.

If this debt is not requested in full immediately, the mortgager has 12 years to sue the mortgagee under the contract.²¹⁰ The 12 year rule covers the fact that the mortgagee being able to recoup their outstanding debt in full from the mortgagor after the property is sold, if the sale proceeds were not enough to cover the outstanding debt. It is difficult to understand how this would work in practice as the new buyer would not proceed to exchange unless they received an undertaking from the seller's solicitors that the mortgagee's charge would be removed on the completion of the property purchase. If the mortgagee gave this assurance, then this would give the new buyer a clear title. However, the mortgagor's relationship with the mortgagee does not terminate until the mortgagee has received the outstanding debt in full. Therefore the remedy in contract is adequate and protects the mortgagee well. The mortgagee also requires that the property is insured at the mortgagor's expense. This protects their security in the event of loss, fire or damage. The mortgagee's interest must be noted at the time of issue.²¹¹

4.2 Foreclosure

The purpose of foreclosure is to vest the legal estate in the property in mortgagee

²¹⁰ Limitation Act 1980, s 15(1).

²¹¹ Law of Property Act 1925, s 108.

free from subsequent charges but subject to prior charges. It involves the mortgagee applying for an order from the court.²¹² The court has power under s. 91(2) of the Law of Property Act to order sale in lieu of a foreclosure.

This remedy can only be used if the contractual obligation to repay the mortgage debt has been breached.²¹³ This remedy involves the transfer of the property to the mortgagee in an attempt to settle the debt in full. Issues arise when the property either falls below or exceeds the amount of the debt. In order to seek foreclosure as a remedy, a court order is required to prevent abuse, where the courts will allow the mortgagor the opportunity to redeem the mortgage. This may be an unrealistic solution, as it is clear that the mortgagor is in financial difficulty and if this option was available to them at the outset then they would not have been in such a situation.

The mortgagee is required to obtain a foreclosure order through the courts but must wait until the payments have become due. If the Court grants the order, it will request that the mortgagor repays the mortgage within a set date. If the mortgage is not repaid within this date, then the order becomes absolute. This method is unfavorable to the mortgagee. Its limitations are that there is a chance that a foreclosure may be reopened after the property has been sold and the mortgagee will lose his right to

²¹² Section 88 of the Law of Property Act 1925. An order for foreclosure obtained by a registered charge is completed by the cancellation of the registered charge and the registration of the former chargee as the sole proprietor of the property.

²¹³ *Williams v Morgan* [1906] 1 Ch 804.

sue once the property has been sold.²¹⁴ Foreclosure is a remedy that is only very rarely used in relation to domestic properties.

4.3 Taking possession

Another right available to the mortgagee is that of immediate possession.²¹⁵ This was reflected by Harman J, in *Four Maids Ltd v Dudley Marshall Properties Ltd*²¹⁶ when he held that the mortgagee 'may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or implied, whereby he has contracted himself out of that right.'²¹⁷ It is alarming to note that where no provision concerning the limitation of the right to possession is made in the mortgage this right to possession arises without any default from the mortgagor.

Harman's comments suggest that the mortgagee gives the mortgagor the opportunity to repay the mortgage in a short time otherwise possession is likely.²¹⁸ In fact in *Ropaigealach v Barclays Bank plc*²¹⁹ Clarke LJ went on to say: ...many mortgagors would be astonished to discover that a bank which has lent them money to buy a property for them to live in could take possession of it the next day.²²⁰

²¹⁴ David S Ryland 'Remedies and Strategies on the enforcement of property charges' [1990] Journal of International Banking Law 240. See Law of Property Act 1925, s.91 –sale rather than foreclosure.

²¹⁵ See also Law of Property Act, s 87 (1). The right is unaffected by the grant of a sub-charge see *Credit and Mercantile plc v Marks* [2004] EWCA Civ 568 [2005] Ch .81.

²¹⁶ [1957] Ch 317. See also *Alliance Perpetual Building Society v Belrum Investments Ltd* [1957] 1WLR 720, *Hughes v Waite* [1957] 1 WLR 713.

²¹⁷ At p320.

²¹⁸ *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883.

²¹⁹ [1999] 4 All ER 235.

²²⁰ [1999] 4 All ER 235 at 253.

Harman went on to say that this right is usually restricted by an express term in the mortgage contract. In order to take possession only a claim needs to be served on the mortgagor and any other person in possession who claims a right to possession against the mortgagee under Civil Procedure Rules Part 55. Also a court order is required which states that the mortgagee is not in breach of s. 6 of the Criminal Law Act 1977. This section applies where the property is occupied.

Otherwise if the mortgagee does not protest to such entry, such an order may not be required according to *Ropaigealach v 126Barclays Bank plc.*²²¹ The case shows the limitations of s.36 which is only engaged when an application for possession is made. If possession is agreed between the parties, there is no requirements for the mortgagee to apply for possession through the courts then no doubt it can be assumed, that the mortgagee will not want to delay any further action and will not want the court to postpone possession. However such postponement applies under s.36 of the Administration of Justice Act 1970 for dwelling houses²²² if an application for possession is made and the requirements under s.36(1) are met on the facts.

In any unregistered land transaction, it is usual for the mortgagee to hold the deeds to the property. This controls any further action by the mortgagor without the mortgagees consent. In registered land, a charge is created in favour of the

²²¹ [1999] 1 QB 263.

²²² See s 5.3.4.

mortgagee and registered against the property.²²³ The mortgagee has a right to possession of the land as stated in *Four Maids Ltd v Dudley Marshall (Properties) Ltd*²²⁴ and *National Westminster Bank plc v Skelton*.²²⁵ To the benefit of the mortgagor and part of common practice, this right may be restricted by a term in the mortgage deed, which states that possession will not be taken whilst the mortgagor makes regular payments, as in *Birmingham Citizens Permanent Building Society v Caunt*.²²⁶ In addition, the mortgagee is under a duty to take reasonable care of the property and will be liable for negligence amounting to willful default.²²⁷

In *Palk v Mortgage Services Funding plc*,²²⁸ the Court of Appeal stated that an order of sale would be ordered, if that was not in the best interests of the mortgagor. In this case the mortgagee was of the hope that it would benefit from the rise in property prices at the mortgagors expense. The method by which possession is sought must be peaceful, involving an application to the court if necessary; however, no such application was required in *Ropaigealach v Barclays Bank plc*.²²⁹

Although it must be noted that this case was very exceptional in its facts. The facts of the case were that when the mortgagor fell into arrears their lender wrote a final demand letter. The mortgagor did not receive this letter as they were not living in the

²²³ S 27 (2) (f) of Land Registration Act 2002.

²²⁴ [1957] at p 320.

²²⁵ [1993] 1 WLR 72.

²²⁶ [1962] Ch. 883.

²²⁷ *Hughes v Williams* (1806) 12 Ves. 493.

²²⁸ [1993] Ch. 330.

²²⁹ [1990] 1 QB 263.

property during its renovation and did not hear of the sale until they were told by a neighbour. This statute is crucial in the context of domestic mortgage repossession.

Section 36 was essentially passed to deal with the decision in *Birmingham Citizens Permanent Building Society v Caunt*²³⁰ where Russell J made the unrealistic suggestion that the 'only relief available to a mortgagor was to allow him a short period to enable him to redeem the mortgage by repaying the whole sum.' This Act gave the courts discretion to suspend or postpone the date of delivery of possession, adjourn the proceedings, stay or suspend judgment.²³¹

The powers conferred upon the courts under this Act can be exercised so as to allow the mortgagor time to repay his arrears if the mortgagee is not granted immediate possession if the property in question is a dwelling house²³² This potentially enables the court to afford the mortgagor some protection from the courts, with the hope that their home may be saved. This Act allows reconsideration of taking immediate possession in favour of the mortgagee.

4.4 Right to Sell

²³⁰ [1962] Ch. 883.

²³¹ Section 36(2).

²³² The definition for a 'dwelling house' is under s39 of the Administration of Justice Act 1970. A dwelling house does not need to be the mortgagor's home as in *Bank of Scotland v Miller* [2002] QB 255 in which the property was a nightclub with an unoccupied flat above.

The Law of Property Act 1925 s.101-107, provides the mortgagee with the power of sale. This right is the most common exercised remedy and is sometimes exercised together with the right to possession.

The mortgagee's right to sell is usually provided for by an express term in the mortgage itself. However, s.101 applies where this is absent and where the mortgage is created by deed.

Under s.101 (1) (i) of the Law of Property Act 1925²³³ the following is implied into the mortgage deed as follows:

A mortgagee's right to sell is valid if:

- (i) the mortgage was made by deed²³⁴
- (ii) the deed contains no provisions excluding the statutory power²³⁵
- (iii) the contractual date for redemption has passed and the money has become due under s.101 of the Law of Property Act.

However, it should be noted that the power does not become active in practice until, at least one of three following conditions set out under s.103 have been satisfied:

- (i) Notice requiring payment of the mortgage money has been served on the mortgagor and default has been made in payment of part or all of it for three months thereafter²³⁶ or

²³³ The provisions relating to the power of sale may be varied or excluded by the mortgage deed: The Law of Property Act 1925 s 101 (3) (4).

²³⁴ Law of Property Act 1925, s 101 (1).

²³⁵ Law of Property Act 1925, s 101 (4).

²³⁶ Law of Property Act 1925, s 103 (i) Alternatively the notice may demand payment in three months and the mortgagee, if unpaid, may then sell at once: *Barker v Illingworth* [1908] 2 Ch 20.

- (ii) Some interest under the mortgage is two months or more in arrears²³⁷
or
- (iii) There has been a breach of some provision contained in the Act or in the mortgage deed²³⁸ for example a breach of covenant to repair or insure.

In order for the mortgagee's right to exercise their power of sale the following Conditions, must be met:

- (i) That standard practice will be for the mortgagee to send notice following default.
- (ii) The mortgagee is on three months in arrears since the notice was served or the interest due is in arrears for two months.
- (iii) That the mortgagor has breached a provision of the mortgage deed or the Law of Property Act 1925.²³⁹

If however the mortgagee does sell before the power is exercisable, under, s.103, the mortgagor can sue the mortgagee for damages under s. 104, where the mortgagor can claim for such things as the cost of removal, or for accommodation between the date of sale and the time when the power did become exercisable.

4.5 The Mortgagee's General Duty

In an attempt to sell the property quickly, the mortgagee must be aware of the importance of the above conditions, as failure to abide by them could result in them

²³⁷ Law of Property Act 1925, s 103(ii).

²³⁸ Law of Property Act 1925, s 103(iii).

²³⁹ For example an obligation to insure.

being liable to pay damages to the mortgagor.²⁴⁰ In addition, the mortgagee must act in good faith and take reasonable care to obtain the true market value of the property at sale,²⁴¹ as evidenced in *Cuckmere Brick Co Ltd v Mutual Finance Ltd*.²⁴² In this case the mortgagee failed to make adequate reference in the auction advertisements to the planning permission in full which resulted in the property being sold at undervalue. The Court of Appeal held that the mortgagee was liable in damages to the mortgagor. In this case the conduct of the mortgagee upon sale follows a subjective and objective test:

'The mortgagee must always act in good faith and discharge a duty of reasonable care towards the mortgagor.'

Lightman J in the *Silven* case²⁴³ stated that the mortgagor must 'take proper care whether by fairly and properly exposing the property to the market or otherwise to obtain the best price reasonably obtainable at the date of sale.'²⁴⁴

In *Palk v Mortgage Service Funding plc*²⁴⁵ CA Sir Donald Nicholls reaffirmed this point and stated:

...he must take reasonable care to maximise his return from the property. Similarly if he sells the property: he cannot sell hastily at a knock down price sufficient to pay off his debt. The mortgagor also has an interest in the

²⁴⁰ The Law of Property Act 1925, s 104 (2).

²⁴¹ *Hugh v Union Bank of Canada* [1913] AC 299,311.

²⁴² [1971] Ch 949.

²⁴³ [2004] 4 All ER 484.

²⁴⁴ *Silven Properties Limited v Royal Bank of Scotland plc* [2004] 1 WLR 997;CA at 19.

²⁴⁵ [1993] Ch. 330.

property and is under a personal liability for the shortfall. The mortgagee must keep that in mind. He must exercise reasonable care to sell only at the proper market value.²⁴⁶

The decision in *Palk* ultimately risks any chance in repayment for arrears from the proceeds of any sale.

Prior to this decision, Lord Moulton also confirmed in *Mc Hugh v Union Bank of Canada*,²⁴⁷ the mortgagee's reasonable duty upon sale.

It is well settled law that it is the duty of a mortgagee when realising the mortgaged property by sale to behave in conducting such realization as a reasonable man would behave in the realisation of his own property, so that the mortgagor may receive credit for the fair value of the property.

There is restriction against the mortgagee selling to themselves²⁴⁸ although there is no restriction on them to sell to a company in which they own shares. On the assumption that the mortgagee wants to sell as soon as a reasonable offer is made and not wait further in case a better offer is received. In such an instance, the Court can order sale under s.92 (2) of the Law of Property Act upon the request of the mortgagee or mortgagor, even if either party wants to postpone the sale.

This is inadequate for the purposes of protecting both the mortgagor's and mortgagee's interests. The mortgagee is under a general duty to the mortgagor to

²⁴⁶ At 337-8.

²⁴⁷ [1913] AC 299, 311.

²⁴⁸ *Farrar v Farrar Limited* [1888] 40 Ch. D 396.

act in good faith and to use the power only for proper purposes.²⁴⁹ However, this may prove difficult if their interests conflict with those of the mortgagor.

4.6 The Proceeds of Sale

Section 105 of the Act details the duties of the mortgagee in his application of the proceeds of sale covering how the monies are to be held. Once the property is sold, the mortgagee acts as the trustee of the proceeds of sale under s.105 Law Property Act and holds the proceeds of the sale to discharge prior incumbrancers, pay the expenses of sale, discharge money due to the mortgagee under the mortgage, pay balance to the next mortgagee or the mortgagor. Section 105 stipulates the order of priority for payment of costs, first the payment of costs incurred in and fees as a result of the sale, secondly the settlement of the mortgage debt and then any surplus if any, to the mortgagor. In addition, the mortgagee could sue under contract if they have suffered monetary loss as result of the mortgagor's failure to pay.²⁵⁰

There has been questions regarding the liability of mortgagees, such as, whether the property is sold at an under value or been mismanaged.²⁵¹ Lightman J commented on all the case law in relation to this issue. He began by saying that a 'mortgagee is under no obligation to exercise any of his powers. He is entitled to

²⁴⁹ *Burgess v Aunger* [1998] 2 B.C.L.C 478 AT 482.

²⁵⁰ Frisby examines the mortgagee's duty to account in the case of *Medforth v Blake* in his article: 'Making a Silk Purse out of a Pigs Ear: *Medforth v Blake & Ors*' (2000) 63 MLR 413, 416.

²⁵¹ *Silven Properties v Royal Bank of Scotland plc* [2004] 1 WLR 997.

remain totally passive and the lender can choose to sell even if this is the worst possible moment.’ However, if the mortgagee chooses to take possession, there becomes an implied duty of care as stated in *Downsview Nominees Ltd v First City Corporation Ltd*.²⁵² Lightman J further stated that a ‘mortgagee is not a trustee of the power of sale for the mortgagor’ which gives the mortgagee the freedom to sell without notice to the mortgagor, as in *Raya v Austin Gray (a firm)*.²⁵³ In *Meretz Investments NV v ACP Ltd*²⁵⁴ it was decided that the sale is lawful, if there were other motives for the sale as long as, one reason is to enforce the security, then this is lawful. All in all there is enough to strengthen the manner of the sale. In *Silven*, Lightman J also said that:

the mortgagee is entitled to sell the mortgaged property as it is. He is under no obligation to improve it or to increase its value which appears to be a fair comment as at repossession neither the mortgagor nor mortgagee wants to incur further financial risk.

Lightman J, has commented in favour of the mortgagee. As comfort to the mortgagor, he suggested that the mortgagor should agree the mortgage terms, at the outset. This is the way it works theoretically in contract however, this does not happen in practice as the mortgagor will not dispute the mortgagee’s terms in case the offer of finance is refused and does not go ahead. It appears that the mortgagee has more power and influence over the terms and the mortgagor goes along with these. It is merely for the mortgagor to read the terms and agree to them by executing

²⁵² (No 1) [1993] AC 295 at p 315A.

²⁵³ [2002] EWCA Civil 1965).

²⁵⁴ [2007] Ch 197.

the document, without having an opportunity to question or challenge them, which may be the root of the problem.

Lightman J's second solution to the mortgagee is that 'a mortgagor has the right to redeem and therefore, should exercise this right if he feels threatened by the mortgagee's rights'. This may be the case but if the mortgagor had funds readily available at the outset then there would not have been a need to resort to a mortgage.

Where the mortgagor cannot discharge the arrears by periodic payments and whose only option is to sell the property as granted in *Bristol and West Building Society v Ellis*.²⁵⁵ The sale may take less time, as unlike foreclosure the power of sale is exercisable without a court order.

4.7 Additional rights of a mortgagee

In addition to the main rights of a mortgagee, there are additional rights available. There is a right to fixtures, right to possession to the title deeds, the right to insure against fire at the mortgagor's expense and the right to consolidate.

²⁵⁵ [1996] 73 P & CR 158.

There are some rights which benefit both the mortgagor and mortgagee. One of such rights is to redeem the mortgaged property. The mortgagor has the right to redeem partially or in full.

There is an additional right available to the mortgagee by enforcing its security by forcing a mortgagor into bankruptcy. This will then mean that they become the mortgagor's creditor in bankruptcy. The trustee in bankruptcy will, under s.14 of the Trusts of Land and Appointment of Trustee Act 1996 and s. 335A of the Insolvency Act 1986, sell the home and will provide the sale proceeds to the mortgagee as the first chargee. This can occur as early as one year into the mortgage under subsection (2) of s. 335A of the Insolvency Act 1986. This period acts as the final timescale, after this period the mortgagor and his family is at the mercy of the mortgagee and no further judicial involvement is allowed or any further factors are not taken into account.

However, the remedies are only available to the mortgagee after they have gone through the court procedure and obtained court order. This involves time and expense for both parties. But at least the mortgagee will be in better financial position to make this expense in comparison to the mortgagor who is not in a position to stretch their finances any further.

This chapter has highlighted some of the complicated areas of Mortgage Law, the

conflicts that arise in Mortgage Repossessions and the response of the courts. Nevertheless, mortgages play a significant part in home ownership and future utilisation of property. However, due to the various conflicting demands of a mortgage, this creates competing interests between the mortgagees, mortgagors and other occupiers who are not named on the mortgage. The law has sought to stipulate the rights of each competing party in an attempt to balance each party's interest. It is important that mortgagees are able to lend without any reservations, but equally important is the reassurance that the rights of the vulnerable mortgagor are protected. It would be more appropriate to assess the adequacy of these rights in favour of each party depending on the facts and circumstances of each individual case, although in some circumstances case law attempts to generalise each decision with an attempt to cover such similar cases in the future. Although what has been reported to date, overall the lenders charge seems outweigh that of the borrowers.

CHAPTER 5

RECENT DEVELOPMENTS AND FUTURE PLANS

Following the decision in *Horsham*, in February 2009, a Private Members Bill known as the Home Repossession (Protection) Bill 2008-2009 was introduced. It proposed a significant amendment to the mortgagee's power of sale in respect of residential properties. It stated that the mortgagee must apply for a court order before taking possession of the property. The Bill would have amended the existing s.101 of the Law of Property Act, to provide that, where the mortgage relates to a dwelling house, a power of sale is subject to the mortgagee applying to the court for permission in advance. However as it was not passed in Parliamentary session it will never be law and a new Bill will need to be introduced and subsequently passed.

If it is likely that the mortgagor will make payments towards the mortgage, then the court would need to consider this under AJA 1970 s.36. If such a Bill is enacted this will alter the balance in favour of the mortgagor. Unlike at present, the power of sale would consequently be subject to court approval, which would potentially involve delay and additional cost for the mortgagee.

The CML's response to the proposed Bill was that 'its members should be allowed to regulate themselves without changes to their legal rights'. They also confirmed that 'their members have already agreed on a voluntarily basis not to seek to sell an

owner occupied property without first obtaining a court order for possession.’²⁵⁶

The most significant changes in this area of law have derived from the *Norgan* and *Horsham* cases in relation to offering protection to the mortgagor. Although the latter case is less significant in practice. It is apparent that the government had not raised the topics proposed in the introductory Bill as legislation prior to the *Norgan* or *Horsham* cases, yet they are keen to offer and show support for them.²⁵⁷ The government vested interest in lenders being willing to lend as mortgagees, which are important to the economy and housing.

However, the government has also introduced measures which will assist mortgagors with arrears in the form of the Mortgage Rescue Scheme²⁵⁸ which came into force on the 26 April 2014. The scheme is designed to help those who are in danger of losing their home and being rendered homeless as a result and intends to implement further rules in respect of lending. The main reforms will cover satisfaction of the customer’s income, encouraging interest only mortgages at the outset, interactive lending which involves only telephone and face to face consultations together with a stress test. These reforms have been introduced in an attempt to deter people from entering into mortgages where there is likely to be repayment difficulty in the future, and of course will add to the existing guidelines, and in some

²⁵⁶ <www.cml.co.uk> accessed 13 April 2013.

²⁵⁷ Ministry of Justice Press Release 14 August 2009 – <www.webarchives.nationalarchives.uk> accessed 3 October 2012.

²⁵⁸ <www.fca.org.uk/firms/firm-types/mortgage-brokers-and-home-finance-lenders/mortgage-market-review> accessed 5 May 2014.

situations may supersede them. Although these rules appear sensible for both the lender and borrower, it may be questioned as to whether they would reflect a borrower's financial situation over the whole term of the mortgage as this could clearly improve or worsen depending upon a range of factors, some of which may be unforeseeable at the time.

The concern is that mortgagees may not be prepared to comply with the Mortgage Rescue Scheme which is potentially to their detriment and does not have any legal standing.

As parties to any legal transaction each party strives for their best interests. However, behind this there is, on a much larger scale, the Government, who strives not for the best interests of the various parties but for the Government as a whole with ongoing influence from the global leader the US where the mortgage repossession 'disease' originated from. No doubt if repossession originated from US then any betterment of the US repossession situation should better the situation here in the UK.²⁵⁹

Therefore, although the rules aim to eliminate 'reckless lending' at that particular

²⁵⁹ Michael Attack 'The UK mortgage hangover – some potential cures?' <www.mortgagefinancegazette.com/arrears/the-uk-mortgage-hangover-some-potential-cures/> The Mortgage Gazette (3 October 2008) accessed 16 January 2014.

time, they are unable to account for a borrower's financial wellbeing in the future. This allows a conclusion to be made which suggest, that if a borrower is not in a good financial position at present, then it is likely that they will never be, so even if the borrower is in a good financial position this could ultimately change for the worse. However the effect of the recent changes brought in following the Mortgage Review remain to be seen.

In response to the inadequacies of Mortgage law, experiments with subtle treatments to adapt to the changes have been refined through organisations such as the FSA/FCA, although the 'back bones' of the relevant legal rules, primarily the Law of Property Act 1925, remain unchanged. This approach allows the flexibility of any legal argument in the attempt to explore all avenues by our judges, who significantly contribute to the case of each 'patient' to this 'disease' whether, that may be the mortgagor, mortgagee or third party occupier. Currently as discussed in this thesis, legislation and case law has 'diagnosed this 'disease' in many different ways to provide a range of adequate 'treatments' to various legal questions, but there is a need for a more comprehensive and streamlined breakthrough in order for all parties to remain 'healthy' and avoid its increase. This breakthrough will be exciting and create room for further debate in the future although the key is that this will be more positive and coherent in comparison to the current situation, allowing all parties to work together, thus avoiding disputes resulting in 'in patients' which will be cost

effective for all.²⁶⁰ The thesis has highlighted that the remedies and rights of the lender's charge are 'hard law', whilst the policy developments and practices that protect home owners tend to be 'soft law'. This in itself is interesting as primarily the lenders interest overweighs that of the borrowers which is answer the question and is the reason for the continued existence of mortgage repossessions today.

WORD COUNT: 31224 (excluding ancillary data and references)

²⁶⁰ See the Ministry of Justice 'Power of Sale and Residential Property Consultation Paper CP55/09' Published on 29 December 2009.

GLOSSARY

Cesser on redemption: The process by which a mortgage automatically comes to an end when the obligation which it secures is performed.

Charge: An encumbrance securing the payment of money.

Clog: Any restriction imposed by the mortgage on the mortgagor's right to redeem the mortgaged property.

Conveyance: An instrument (other than a will) which transfers property from one owner to another

Equity of redemption: The mortgagor's interest in the property during the continuance of the mortgage.

Foreclosure :The procedure by which a mortgagee asks the court to extinguish the mortgagor's equitable right to redeem, and his other rights to the property, and to permit the mortgagee to take the property in satisfaction of the debt or other obligation for which it is security.

Mortgage: The grant of an interest in property as security for the payments of a debt or discharge of an obligation.

Mortgagee: The person to whom a mortgage is granted and the interest in the mortgaged property conveyed

Mortgagor: The person who creates the mortgage and conveys an interest in his property as security for the payment of a debt.

Tack: The right to add a further advance to an earlier debt secured by a mortgage, so that the additional loan shares the priority of the earlier debt and thus takes priority over any intervening mortgages.

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This form should be accompanied by either Form AP1 or Form FR1

Any parts of the form that are not typed should be completed in black ink and in block capitals.

If you need more room than is provided for in a panel, and your software allows, you can expand any panel in the form. Alternatively use continuation sheet CS and attach it to this form.

Conveyancer is a term used in this form. It is defined in rule 217A, Land Registration Rules 2003 and includes persons authorised under the Legal Services Act 2007 to provide reserved legal services relating to land registration and includes solicitors and licensed conveyancers.

Leave blank if not yet registered.

Insert address including postcode (if any) or other description of the property, for example 'land adjoining 2 Acacia Avenue'.

Give full name(s).

Complete as appropriate where the borrower is a company.

Give full name(s).

Complete as appropriate where the lender is a company. Also, for an overseas company, unless an arrangement with Land Registry exists, lodge either a certificate in Form 7 in Schedule 3 to the Land Registration Rules 2003 or a certified copy of the constitution in English or Welsh, or other evidence permitted by rule 183 of the Land Registration Rules 2003.

Each proprietor may give up to three addresses for service, one of which must be a postal address whether or not in the UK (including the postcode, if any). The others can be any combination of a postal address, a UK DX box number or an electronic address.

1	Title number(s) of the property:
2	Property:
3	Date:
4	Borrower: <u>For UK incorporated companies/LLPs</u> Registered number of company or limited liability partnership including any prefix: <u>For overseas companies</u> (a) Territory of incorporation: (b) Registered number in the United Kingdom including any prefix:
5	Lender for entry in the register: <u>For UK incorporated companies/LLPs</u> Registered number of company or limited liability partnership including any prefix: <u>For overseas companies</u> (a) Territory of incorporation: (b) Registered number in the United Kingdom including any prefix:
6	Lender's intended address(es) for service for entry in the register:

Add any modifications.

full title guarantee
limited title guarantee

charges the property by way of legal mortgage as security for the payment of the sums detailed in panel 9

Place 'X' in the appropriate box(es).

8 The lender is under an obligation to make further advances and applies for the obligation to be entered in the register

You must set out the wording of the restriction in full.

The borrower applies to enter the following standard form of restriction in the proprietorship register of the registered estate:

Standard forms of restriction are set out in Schedule 4 to the Land Registration Rules 2003.

Insert details of the sums to be paid (amount and dates) and so on.

9 Additional provisions

The borrower must execute this charge as a deed using the space opposite. If there is more than one borrower, all must execute. Forms of execution are given in Schedule 9 to the Land Registration Rules 2003. If a note of an obligation to make further advances has been applied for in panel 8 this document must be signed by the lender or its conveyancer.

10 Execution

WARNING

If you dishonestly enter information or make a statement that you know is, or might be, untrue or misleading, and intend by doing so to make a gain for yourself or another person, or to cause loss or the risk of loss to another person, you may commit the offence of fraud under section 1 of the Fraud Act 2006, the maximum penalty for which is 10 years' imprisonment or an unlimited fine, or both.

Failure to complete this form with proper care may result in a loss of protection under the Land Registration Act 2002 if, as a result, a mistake is made in the register.

Under section 66 of the Land Registration Act 2002 most documents (including this form) kept by the registrar relating to an application to the registrar or referred to in the register are open to public inspection and copying. If you believe a document contains prejudicial information, you may apply for that part of the document to be made exempt using Form EX1, under rule 136 of the Land Registration Rules 2003.

Land Registry

Cancellation of entries relating to a registered charge

DS1

This form should be accompanied by either Form AP1 or Form DS2

Any parts of the form that are not typed should be completed in black ink and in block capitals.

If you need more room than is provided for in a panel, and your software allows, you can expand any panel in the form. Alternatively use continuation sheet CS and attach it to this form.

Insert address including postcode (if any) or other description of the property, for example 'land adjoining 2 Acacia Avenue'.

Include register entry number, if more than one charge of same date to same lender.

Complete as appropriate where the lender is a company.

The lender must execute this as a deed using the space opposite. If there is more than one lender, all must execute. Forms of execution are given in Schedule 9 to the Land Registration Rules 2003.

Alternatively the lender may sign in accordance with the facility letter referred to in panel 7.

1	Title number(s) of the property:
2	Property:
3	Date:
4	Date of charge:
5	Lender: <u>For UK incorporated companies/LLPs</u> Registered number of company or limited liability partnership including any prefix: <u>For overseas companies</u> (a) Territory of incorporation: (b) Registered number in the United Kingdom including any prefix:
6	The lender acknowledges that the property identified in panel 2 is no longer charged as security for the payment of sums due under the charge
7	Date of Land Registry facility letter (if any):
8	Execution

WARNING

If you dishonestly enter information or make a statement that you know is, or might be, untrue or misleading, and intend by doing so to make a gain for yourself or another person, or to cause loss or the risk of loss to another person, you may commit the offence of fraud under section 1 of the Fraud Act 2006, the maximum penalty for which is 10 years' imprisonment or an unlimited fine, or both.

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