

The content

Debt Advice Handbook 15th edition

Description

With living costs and unemployment rising, budgets squeezed and problem debt on the increase, no adviser should be without this essential guide to the practice and process of giving money advice in England and Wales.

Who's this book for?
It is essential for debt advisers, welfare rights advisers, lawyers, local authority and housing association staff, social workers and union official.

What does it do?
The handbook provides the most comprehensive information needed by advisers on the key stages of money advice, including interviewing clients, establishing liability, prioritising debts, preparing a financial statement, negotiating with creditors and dealing with bailiffs. Fully indexed and cross-referenced to law, regulations and official guidance, and to court and tribunal decisions Includes tactical guidance and examples

What's new?
Fully updated to cover all recent changes to legislation, caselaw and court procedure and practice Emphasis is placed on taking due care of vulnerable clients and making sure that any payment arrangements agreed are appropriate. There is a focus on sustainable credit arrangements that do not affect a client's abilities to pay essential living expenses and priority debts.

Properties

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If the loan is a regulated credit agreement under the Consumer Credit Act 1974 (see here), a default notice (see here) must first be issued. The lender must obtain a court order before taking possession (including where the secured loan is a regulated mortgage contract), but the client could give their informed consent to the lender taking 'peaceable possession'. 1

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1 ss126 and 173(3) CCA 1974

Guidance to lenders

Pre-action protocol

If the mortgage was made on or after 31 October 2004 (or on or after 21 March 2016 in the case of secured loans), it may be regulated by the Financial Conduct Authority (FCA – see here). If so, the lender is required by the *Mortgages and Home Finance: Conduct of Business Sourcebook* to deal 'fairly' with borrowers in arrears and have a written arrears policy and procedures. 1 This should include:

- providing clients with details of missed payments, the total amount of arrears, the outstanding balance due under the mortgage, any charges incurred to date, an indication of possible future charges and a copy of the current MoneyHelper's information sheet *Mortgage arrears or problems paying your mortgage;* 2

- making reasonable efforts to come to an agreement with the client about repaying the arrears; [3]
- liaising with an adviser or agency if the client arranges this;
- allowing a reasonable time for repayment, bearing in mind the need to establish, where feasible, a practical repayment plan for the client's circumstances (in appropriate cases, arranging repayments over the remaining term of the mortgage);
- granting the client's request for a change to the payment date or method of payment (unless the lender has a good reason for not agreeing to this);
- if no reasonable repayment arrangement can be made, allowing the client to remain in possession of the property to enable it to be sold;
- repossessing the property only where all other reasonable attempts to resolve the situation have failed.

The lender must take into account the client's circumstances and consider whether it is appropriate to agree to:

- extend the term of the mortgage;
- change the type of mortgage – eg, repayment mortgage to interest-only mortgage;
- defer interest payments;
- capitalise the arrears;
- make use of any government mortgage rescue initiatives (see here).

If arrears have been capitalised and rescheduled over the remaining mortgage term, they are no longer arrears and so cannot be relied on as the basis for starting a repossession claim. If a client does not pay the full monthly contractual instalment, the lender must allocate the payment in a way that minimises the arrears (which should minimise the default interest and charges).

The lender should also have given the client certain prescribed information (see here). In addition, many mortgage lenders do not seek possession until mortgage interest payments are three, or even six, months in arrears.

In October 2011, the Council of Mortgage Lenders (part of UK Finance) issued industry guidance on arrears and possession to assist lenders to comply with their duty to treat customers fairly. It is at cml.org.uk/policy/guidance/all/industry-guidance-on-arrears-and-possessions-to-help-firms. This includes examples of good practice for lenders, such as:

- encouraging clients at the earliest opportunity to contact independent free money advice providers, and providing a dedicated contact point within the arrears handling department for money advisers;

- when agreeing repayment arrangements, assessing income and expenditure including using financial statements prepared by money advisers, ensuring staff have the flexibility to agree repayment periods suitable for individual circumstances and taking into account repayment levels ordered by the courts and other priority debts;
- if no reasonable repayment can be made, informing clients that they can stay in the property to sell it, explaining how this will work and considering:
    - ways of helping clients to end their home ownership, including through an assisted voluntary sales scheme; *and*
    - when they will allow sales at shortfall to proceed – ie, if the client is in negative equity;
- applying for a possession order only when:
    - all attempts to contact or liaise with the client have failed; *or*
    - it has not proved possible to agree an affordable repayment arrangement; *or*
    - the client has not been able to maintain the agreed repayments;
- not applying for a possession order:
    - when a reasonable negotiated settlement is possible; *or*
    - to discipline clients into maintaining payment arrangements; *or*
    - if an arrangement is in place to which the client is adhering; *or*
    - if an arrangement to pay is entered into after the proceedings have started; *and*

consider agreeing to the hearing being adjourned instead;

- checking that the mortgage arrears pre-action protocol has been complied with, including completing the compliance checklist before the hearing.

If a lender does not treat a client fairly, consider making a complaint to the Financial Ombudsman Service (see here).

Note: from 26 June 2023, signatories to HM Treasury's Mortgage Charter have agreed that a borrower will not be forced to leave their home without their consent in less than a year from their first missed payment, unless there are exceptional circumstances. This also applies where a possession order has been granted. This is a voluntary charter and is not binding on the court, so borrowers whose lender starts a possession claim or applies for a warrant in breach of their agreement with HM Treasury can apply to the Financial Ombudsman Service. You can view the Charter at gov.uk/government/publications/mortgage-charter/mortgage-charter.

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1 See *FCA Handbook*, MCOB 13 at handbook.fca.org.uk/handbook/mcob/13

2 Available from moneyhelper.org.uk/en/homes/buying-a-home/mortgage-arrears-if-you-have-problems-paying-your-mortgage

3 Under *FCA Handbook*, MCOB 12.4, if the client has a payment shortfall, any payments received must be allocated first to paying off the balance of the shortfall (excluding interest and charges). If the client has a payment arrangement for the arrears and is keeping to it, the lender should not impose any arrears charges.

Pre-action protocol

The mortgage arrears pre-action protocol (part of the Civil Procedure Rules) aims to encourage lenders and borrowers to reach an agreement without the need for proceedings. It makes it clear that starting a possession claim should 'normally' be the last resort and should not 'normally' be started unless all other reasonable attempts to resolve the situation have failed. The parties (or their advisers) should take all reasonable steps to discuss with each other the reasons for the arrears, the client's financial circumstances, whether the client's financial difficulties are temporary or long term and the client's proposals to clear the arrears 'in a reasonable time'. The protocol has no guidance on what this might be (unlike for rent arrears – see here).

Lenders must consider postponing possession action if:

- the client has made a claim:
    - to the DWP for a benefit that includes an amount for housing costs – eg, support for mortgage interest (SMI) loan for universal credit (UC) claimants; *or*
    - under a payment protection insurance (PPI) policy; *or*
    - to a local authority for support under a mortgage rescue scheme or other means of homelessness prevention support.

They must have supplied all the information necessary to process a claim and have a reasonable expectation that it will be successful; *or*

- the client can demonstrate that they have taken (or will be taking) reasonable steps to sell the property at an 'appropriate price' (presumably one which will clear the mortgage and any other loans secured on it) and that they continues to actively market the property; *or*
- the client has made a 'genuine complaint' to the Financial Ombudsman Service about the possession claim. As a complaint has to be made first to the lender and is only referred to the Financial Ombudsman Service if the lender either fails to issue a final response or rejects the complaint, it is unlikely that lenders will accept that complaints are genuine unless the Ombudsman agrees to investigate.

If the lender decides not to postpone issuing possession proceedings, it must inform the client at least five business days before doing so.

The lender must be able to explain to the court what actions it has taken to comply with the protocol, and have two copies of Form N123 available at the hearing. This is a checklist verified by a statement of truth in which the lender confirms that it has taken various steps. These include checking whether a tenant of the client is occupying the property, whether the lender authorised the tenant and what order the lender is seeking in the light of the information obtained. Failure to produce Form N123 gives the court grounds to strike out a possession claim for failure to comply with a rule, [1] although it might prefer to adjourn the hearing to enable the lender to comply.

The client should be advised to ask the court to make an order that the lender bears its own costs of any additional court hearing that takes place due to its non-compliance.

If the lender does not comply with the protocol

A lender's non-compliance with the pre-action protocol is not grounds for the court to refuse to make a possession order. However, if the court believes that the lender has not complied with the substance of the relevant principles and requirements (as opposed to minor or technical shortcomings which have had no overall effect on the situation), it can:

- 'stay' (ie, suspend) the proceedings until the steps which ought to have been taken have been taken; *and/or*
- make an order not to allow costs, or pay costs, to the other party.

If the lender appears not to have complied, point this out and argue that no further action should be taken, provided the client complies with their obligations under the protocol, such as by making payments or actively pursuing a claim for PPI, benefits or a proposed sale of the property. Also point this out on Form N11M (see here) and put the arguments to the district judge at the hearing for any dismissal, or (more likely) for the possession claim to be adjourned, or in relation to costs.

Note: if the client has not complied with the protocol, the court takes this into account. [2]

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1 r3.4(2)(c) CPR

2 See C Howell, 'Preventing mortgage repossessions', *Quarterly Account* 33, IMA

The claim form

Possession claim online

The possession claim form (Form N5) includes the date and time of the hearing. It must be accompanied by a particulars of claim (Form N120). The lender can supply its own particulars of claim, provided it contains details of: [1]

- the identity of the property to be recovered;
- whether the claim relates to residential property;
- the ground(s) on which possession is claimed;
- the mortgage or charge;
- every person in possession of the property (to the best of the lender's knowledge);
- whether any charges or notices have been registered under the Family Law Act 1996 or Matrimonial Homes Acts 1967–1983;
- the date of any tenancy entered into between the borrower and a tenant, whether or not the lender authorised the tenancy and, if so, what steps the lender intends taking in respect of the tenancy;
- the state of the account between the client and lender, including:
    - the amount of the advance, any periodic payments and any repayment of interest required to be made;
    - the amount which would have to be paid, taking into account any allowance for early settlement, to redeem the mortgage at a stated date not later than 14 days after the start of proceedings, including solicitors' costs and administrative charges;
    - if it is a regulated consumer credit agreement, the total amount outstanding under the terms of the mortgage;
    - the rate of interest payable originally, immediately before any arrears accrued and at the start of proceedings;
    - a schedule of arrears, showing all amounts due and payments made together with dates and a running total of the arrears either for the previous two years or from the date of default, if later;
    - details of any other payments required to be made as a term of the mortgage (such as insurance premiums, legal costs, default interest, penalties, and administrative and other charges), whether any of these payments are in arrears and whether or not they are included in the periodic payment;
- whether or not the loan is a regulated consumer credit agreement and the date(s) on which the appropriate notices under the Consumer Credit Act 1974 have been served;
- information that the lender knows about the client's circumstances and, in particular, whether

they receive benefits and whether direct mortgage interest payments are being received from the DWP;

- any previous steps taken by the lender to recover either the money secured under the mortgage or the property itself, including dates of any court proceedings and the terms of any orders made;
- the history of arrears (if longer than two years). This should be stated in the particulars and a schedule of the arrears should be exhibited to a witness statement and served separately, at least two days before the hearing.

All the above requirements are covered in paragraphs 1 to 9 on Form N120. The lender may also include a money-only claim arising out of an unsecured loan agreement. Although the lender can obtain a money judgment in respect of such a debt, it cannot be enforced as part of any possession order. [2] The lender does not normally seek an order for costs, as the mortgage normally allows these to automatically be added to the outstanding balance.

A statement of truth must verify the particulars of the claim must.

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1 CPR PD 55A, paras 2.1-2.7

2 CPR PD 55A, para 1.7

Possession claim online

Certain specified county courts can now operate a scheme known as possession claim online, which enables lenders to issue claims for possession electronically at possessionclaim.gov.uk/pcol.

The particulars must contain the same information referred to above with one exception. If the lender has already provided the client with a schedule of arrears showing all amounts due and payments made, together with dates and a running total of the arrears either for the previous two years or from the date of default if later, the particulars of claim may contain a summary of the arrears stating:

- the amount of the arrears on the date of the lender's pre-action letter;
- the dates and amounts of the last three payments (or, if less than three payments have been made, the dates and amounts of those payments);
- the arrears on the date possession proceedings are issued.

However, if the lender only includes the summary information listed above in the particulars of

claim, it must serve a full arrears history on the client within seven days after the issue of the claim, but at least two days before the hearing, and verify this by a witness statement or verbally at the hearing.

Proceedings are issued according to the property's postcode supplied by the lender. If this is not the client's local county court hearing centre, they can ask the court to transfer the case. [1]

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1 r30.2(1) CPR

After the claim form is issued

The hearing (which takes place in private) is normally set for between 28 days and eight weeks after Form N5 is issued. The claim form and particulars of claim must be served on the client at least 21 days before the hearing. Within five days of notification of the hearing date, the lender must send a notice to the property addressed to 'the occupiers' containing details of the claim. This aims to alert anyone living there who is not the borrower but who may want to oppose the claim for possession. The lender must also notify any creditor registered at HM Land Registry as having a mortgage or secured loan on the property.

The lender must also write to the local authority for the area in which the property is situated and inform it about the hearing. The lender must be able to confirm at the hearing that these steps have been taken (a witness statement is sufficient). The Ministry for Levelling Up, Housing and Communities has provided guidance to local authorities on what to do with this information to enable them to include it within their overall strategy on preventing homelessness. [1]

Written evidence may be given at the hearing and should be filed at court and served on the other party at least two days before the hearing date. Evidence of the arrears, including interest, should be up to the date of the hearing and refer to a daily rate, if necessary. If the claim cannot be dealt with on the hearing date because there appears to be a substantial dispute, the district judge should give directions and allocate the case to a track (see here).

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1 Available at gov.uk/government/publications/lender-notification-of-repossession-proceedings-to-local-authorities-non-statutory-guidance

Responding to the claim

Completing Form N11M

A 'defence' form (Form N11M) is supposed to be completed and filed at court within 14 days of Form N5 being served, but which may be filed at any time before the hearing. The questions are straightforward, although they are not cross-referenced to the numbered paragraphs in the particulars of claim. It is not a defence as such, but a reply to the claim. It is not essential to respond, but it is advisable to do so, as any delay caused by the client's failure to file a reply may mean further liability for costs. Although there will be a hearing, it is helpful if the district judge has been prepared for the client's circumstances and arguments by submitting a well-completed reply form. [1] A copy of the form is also sent to the lender by the court.

The online claim form contains details of the user name and password to access the website, where the client can complete and file the form online. The website contains a user guide, although most of the information is only relevant to lenders, and there is no guidance on how to complete Form N11M.

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1 For a discussion of the court's powers, see M Robinson, 'Mortgage possession in the county court', *Adviser* 123

Completing Form N11M

Form N11M should be completed as follows.

- **Question 1** requests details of the client's personal circumstances.
- **Question 2** relates to paragraphs 2 to 4 on Form N120, which should be confirmed as correct, or details of any disagreement given.
- **Question 3**. Check the level of arrears carefully. The court may not make an order if it is unsure that the arrears figure is correct.
- **Question 4** needs completing only in cases where possession is sought (perhaps partly) on grounds other than arrears.
- **Questions 5 and 6** are primarily addressed to borrowers whose loans are regulated credit agreements.

Question 5 asks whether the client wants the court to consider whether loan agreement terms are 'fair'. This appears to apply to the unfair relationship provisions of the Consumer Credit Act 1974 (which do not apply to regulated mortgage contracts), as well as to unfairness under the Consumer Rights Act 2015 (which apply to all agreements, not just Consumer Credit Act-regulated agreements). Although one of the main principles of FCA regulation is that lenders

must treat customers fairly, it is not clear to what extent a court could consider a breach of its rules as a defence to possession proceedings. [1]

Question 6 asks whether the client intends to apply for a time order (see here). An application can be made either on this form (which does not have a fee) or by notice of application (Form N244) (which has a fee, but full or partial remission may be possible – see here). [2] As there is only room to tick a box on the N11M, any applications should be supported by written evidence in the form of a witness statement, setting out the grounds.

- **Question 7**. If the arrears have been paid in full by the hearing date, the case should be adjourned. [3]
- **Question 8**. If an agreement has been reached, details should be included. In this case, the reply should ideally be accompanied by a letter requesting a general adjournment. If the lender agrees, it should also write to the court indicating its agreement to a general adjournment. If the agreement has been running since before the action started, the client may argue there was no need to take court action, and ask for the matter to be adjourned generally and challenge any costs the lender seeks to charge. [4] Otherwise, they should send proof of payments, or include a written request from the lender that an order be made and suspended on payment of whatever sum has been agreed.
- **Question 9.** A client should answer 'yes' if agreement has not been reached. **Note**: clients who fail to ask the court to consider instalments might later find this used against them if a local authority questions of the intentionality of their homelessness.
- **Question 10** asks for the amount being offered, in addition to the contractual payments. This question may not be relevant as it is not always necessary for the client to be able to afford the contractual payments for the court to make a suspended possession order. For the position if the client is applying for a time order, see here; for other cases, see below.
- **Questions 11–13** relate to IS, income-based jobseeker's allowance, income-related employment and support allowance and pension credit. It is important to check with the DWP what payments have been made before attending court, so that any misunderstandings with the lender can be resolved. Remember to convert weekly benefit amounts to calendar monthly amounts to compare with monthly mortgage payments. **Note**: the form has not been updated to include UC. Until it is, amend the form by hand to provide information relevant to the client.
- **Questions 14–25** relate to dependants (and non-dependants), bank accounts and savings, income and expenditure, priority debts, court orders and credit debts similar to those required on Form N9A (see here) and should be filled in similarly.
- **Question 26**. The client should *not* answer 'yes' unless the accommodation is absolutely certain. The date given, even in such cases, should always be realistic.

- **Question 27** is important because it allows the client to explain:
  - any breaches of the FCA rules, especially the principle of treating clients fairly and any breaches of the *Mortgages and Home Finance: Conduct of Business Sourcebook* which, although not a defence to the possession claim as such, may be relevant in whether the court uses its discretion; [5]
  - the circumstances in which the loan was made, if relevant – eg, to refinance unsecured borrowing in response to high-pressure selling;
  - why the arrears arose;
  - what circumstances were beyond their control;
  - why it would cause particular hardship if eviction was ordered.

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1 s151(2) FSMA 2000. In *Thakker v Northern Rock (Asset Management) plc* [2014] EWHC 2107 (QB), the High Court dismissed the borrower's appeal against a possession order and held that the lender's breach of the MCOB was not a defence to the possession claim.

2 CPR PD 55A, para 7.1

3 *Halifax Building Society v Taffs* [1999] CLY 4385 (CA)

4 See C Evans, 'The new rules are working!', *Adviser* 79

5 For how this might be applied in mortgage possession proceedings, see N Clayton, 'Mortgage conduct of business rules and mortgage repossessions', *Quarterly Account* 8, IMA

Powers of the court to deal with possession action

If a court is considering an action for the possession of a private house, it has wide-ranging powers in relation to the protection it can potentially give a client with a mortgage or a secured loan not regulated by the Consumer Credit Act 1974. [1] These include:

- adjourning the proceedings (see here); *or*
- suspending a possession order (see here); *or*
- postponing the date of the possession (see here).

If an agreement is regulated by the Consumer Credit Act 1974 (or most regulated mortgage

contracts) (see here), the court should consider making a time order. The client can specicifally request this. See here.

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1 s36 AJA 1970 and s8 AJA 1973

Adjournments

The court has a general power to adjourn any proceedings for a short period. [1] For example, if the client needs more time to obtain money advice or the lender is required to clarify the arrears, the court may adjourn the matter, usually for 28 days. The court may attach terms to the adjournment – eg, that basic instalments are paid or that no further interest is added to the loan. The court can also adjourn the proceedings for a short time to enable the client to pay off the mortgage in full – eg, by selling the property or otherwise satisfying the lender. [2]

The court sends a written notice giving the date and time of the next hearing. If the property is about to be sold or the arrears cleared in full in some other way, the court may adjourn with 'liberty to restore'. This means that there will not be another hearing, provided the expected action happens. However, if the expected action fails, the lender can ask for a hearing to be restored.

You may wish to argue that the matter should be adjourned, rather than have a suspended possession order granted. An adjournment is preferable because no further action, including enforcement, can be taken without a further court hearing. For clients who are vulnerable because of age or disability, this can be a valuable tactic. The court could:

- **adjourn with liberty to restore** – eg, because the arrears have been, or are about to be, paid in full, or the property is in the process of being sold or an agreement to pay the arrears has already been agreed;
- **adjourn for a fixed period** (eg, 28 days) for the client to get further advice or for the lender to produce correct particulars of claim;
- **adjourn generally** because there is a repayment plan agreed and working.

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1 r3.1(2)(b) CPR

2 See *Birmingham Citizens Permanent Building Society v Caunt* [1962] 1 All ER 163

Suspended possession orders

The court can suspend a possession order on such 'conditions with regard to payment by the mortgagor [the borrower] of any sum secured by the mortgage or the remedying of any default as the court thinks fit', provided the client can pay both the arrears and the future contractual payments within a 'reasonable period'. 1

The terms of the order are usually for basic contractual instalments plus £x towards the arrears. However, a number of court cases show this is not always necessary. In one case, an order was made for payment of £250 for one month and £500 for two months, with a review thereafter on the basis that the client had good prospects of obtaining employment within that period. 2 In another case, the client offered £150 a month until mortgage interest became payable by the DWP, which would cover the current payments. 3 Although the arrears would increase in the meantime, they would be cleared within three-and-a-half years. The court made an order accordingly.

In each case, the court held that the test was not whether the client could currently pay the contractual payments, but whether they would be able to clear the arrears and pay the contractual instalments within a reasonable period.

In *Cheltenham and Gloucester v Norgan*, the Court of Appeal said that a starting point for 'reasonable period' should be the remaining period of the mortgage. 4 This valuable precedent strengthens the money advice case for setting repayments at a level the client can afford. In exceptional cases, a 'reasonable period' could be longer than the remaining mortgage. 5 The decision also guides the court on points it should take into consideration, including the means of the client and the value of the lender's security.

When a client defaults, the terms of their mortgage may mean that they have to pay default interest on the arrears and also various fees. In 1992, a district judge suggested that such additional interest/charges should not be taken into account when calculating the arrears for the purpose of establishing whether a client can pay off the arrears and future payments within a reasonable period. This view was confirmed in a case in Northern Ireland, which, although not binding in England and Wales, is persuasive. 6 The court held that the arrears comprised only the missed monthly payments, and that any interest or charges should be added to the capital and included in the regular monthly instalment.

On the whole, courts appear satisfied that, for a long-term agreement, such as a mortgage, the security is safe, especially if there is equity in the property. A clear financial statement is an essential tool. Identify the basic mortgage instalment separately from the payment towards the arrears to demonstrate to the court that the client is able to afford the contractual mortgage payments as well as being able to pay off the arrears within the period requested.

Tactically, you should still look for an affordable sum rather than spreading the arrears over as

long a period as possible, just in case further difficulties arise in the future. Do not be intimidated by creditors and solicitors who say they want the arrears cleared in a shorter fixed period – eg, three years. The court will make its own decision and it should be familiar with the *Norgan* case.

If the arrears cannot be paid by instalments and the mortgage can only be repaid out of the proceeds of sale of the property, the *Norgan* decision does not apply. However, in these cases the court *does* have discretion to suspend possession for a shorter period. In *Bristol and West Building Society v Ellis,* for example, the Court of Appeal held that the 'reasonable period' for a suspended order could be the time it would take to organise the sale of the property. 7

What is a reasonable period depends on the circumstances of each case. Factors the court could take into account include:

- the extent to which the balance of the mortgage, as well as the arrears, is secured;
- whether there is little equity and the value of the security is at risk, in which case a short period of suspension might be appropriate;
- whether there has already been delay and/or there is negative equity or insufficient evidence of the property's value, in which case an immediate possession order might be appropriate.

Note: check the wording of a suspended (or postponed) possession order carefully to see whether it provides for the order to cease to have effect once the client has paid the arrears in accordance with its terms. If the client then falls into arrears again, the lender must obtain a further order and cannot just issue a warrant of possession. If no mention is made that the possession order ceases to have effect once its terms have been complied with, it continues to have effect unless or until the client applies to discharge it under section 36(4) of the Administration of Justice Act 1970. If the client does not do so and falls into arrears again, the lender can apply for a warrant of possession and the client must apply to suspend it. If you are involved at the possession order stage, you can request the district judge to word the suspended possession order so that it is discharged once the arrears are cleared. 8

The lender must apply to the court for permission to enforce the order if more than six years have elapsed since the date of the original possession order. 9

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1 Under s36 AJA 1970 and s8 AJA 1973. See *Zinda v Bank of Scotland* [2011] EWCA Civ 706. These powers are unlikely to apply to 'all monies charges' securing a debt repayable on demand (eg, a bank overdraft), since the client must pay the whole outstanding balance within a 'reasonable period'; see *Habib Bank v Taylor* [1982] 1 WLR 1218.

2 *Royal Bank of Scotland v Elmes*, Clerkenwell County Court (*Legal Action*, April 1998, p11)

3 *Halifax plc v Salt and Bell*, Derby County Court, 29 December 2007

4 *Cheltenham and Gloucester v Norgan* [1996] 1 All ER 449

5 See, for example, *Abbey National v Padfield*, Bristol County Court, 26 July 2002

6 *Santander (UK) plc v McAtamney and Others* [2013] NIMaster 15

7 *Bristol and West Building Society v Ellis* [1996] 29 HLR 282

8 See *Zinda v Bank of Scotland* [2011] EWCA Civ 706

9 r83.2(3) CPR; see also *Zinda v Bank of Scotland* [2011] EWCA Civ 706

End of term mortgages

Borrowers who have reached the end of their mortgage term cannot ask the court to make an order to suspend possession based on paying the contractual instalment plus an amount towards the arrears. They no longer have a contractual monthly instalment as their entire outstanding balance has fallen due. Some lenders argue this means the court has no discretion to give the borrower time. This is incorrect – a borrower can still ask for time to sell or remortgage. If the mortgage is a regulated mortgage contract, they could ask the court to make a time order. 1

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1 Using s36 AJA 1970, without the supplementary s8 AJA 1973. See also A Walker, 'Capital Punishment - interest mortgages at the end of term', *Quarterly Account* 65, IMA

Postponing possession

A court should grant either a deferred or suspended possession order if the proceeds of the sale will fully cover the mortgage, so that a client can remain in their home while it is sold. 1

Creditors have challenged suspended orders made to allow time for properties in negative equity to be sold. The Court of Appeal has held that if the mortgage cannot be cleared from the proceeds of the sale, the court has no jurisdiction to suspend the order, 2 but the court may adjourn the proceedings for procedural reasons. 3 However, in the case of *Cheltenham and Gloucester v Booker*, the Court of Appeal confirmed the court's jurisdiction to postpone giving possession to the lender for a short period to enable the client to sell the property. 4 In addition, the FCA's *Mortgages and Home Finance: Conduct of Business Sourcebook* requires lenders to allow people to remain in possession of the property for a reasonable period to organise a sale in cases where no payment arrangement can be made. 5

Produce written evidence from, for instance, an estate agent that the property is on the market and of the sale price, details of any offers received and, if an offer has been accepted, evidence about how far the conveyancing process has reached, including any proposed completion date from the client's solicitor.

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1 *Target Home Loans v Clothier* [1993] 25 HLR 48

2 *Cheltenham and Gloucester Building Society v Krausz* [1996] 29 HLR 597

3 *State Bank of New South Wales v Harrison* [2002] EWCA Civ 363

4 *Cheltenham and Gloucester v Booker* [1996] 29 HLR 634

5 *FCA Handbook*, MCOB 13.3.2AR(5)

The warrant of possession

If there is no real chance of clearing the arrears or the mortgage, the court makes a possession order, which is usually effective in 28 days. If the client has special reasons (eg, ill health or a new home is not yet available), the court may extend this to 56 days. At the end of the specified period, the lender can apply back to the court for enforcement agents (bailiffs) to execute a 'warrant of possession' (also known as a 'warrant of eviction' – see here). The possession order states that if the client does not leave the property, the lender can ask the court to instruct the enforcement agent to evict them without a further hearing. It also states that the client can apply to the court to postpone the eviction.

A warrant of possession allows a county court enforcement agent to evict the occupants from their home. The client receives notification that a possession warrant has been obtained on Form N54. It states the exact date and time when the enforcement agents will carry out the eviction. However, enforcement agents are now required to give 14 days' notice of evictions and, from 7 August 2021, if an eviction does not take place on the date specified in the notice, a further notice of eviction must be delivered to the premises at least seven days before the new eviction date. [1] The enforcement agents can physically remove the occupants from their home, if necessary, and hand over possession of the property to the mortgage company. This is usually followed by the lender's agent changing the locks to prevent the client moving back in. Form N54 informs the client that:

- a possession warrant gives the enforcement agent authority to remove anyone still in the property when the eviction takes place;
- they should act immediately to get advice about the eviction or rehousing from an advice

agency, solicitor or local housing department;

- they can apply on Form N244 (see here) for the court to suspend the warrant and postpone the date for eviction;
- thye must attend the hearing of the application or it may simply be dismissed, incurring further costs;
- if they can pay off any arrears, they should contact the lender or the lender's solicitor immediately.

Form N54 must also contain details of the enforcement agent and their client or solicitor.

When dealing with a warrant of possession, you should either negotiate directly with the lender or help the client make an application to the court to suspend the warrant (see here). County court enforcement agents acting for a mortgage company which has issued an eviction warrant can change the locks and evict the client if no application has been made to suspend it. They can use necessary reasonable force to carry out the eviction.

A judgment or order for the possession of mortgaged property may also be enforced in the High Court by writ of possession. The High Court enforcement agent must give 14 days' notice of eviction; so, the practice of High Court enforcement agents turning up without any notice to carry out an eviction is no longer lawful. An updated version of Form N54 (Notice of Eviction) is being produced for use in the High Court as well as the county court. If a possession order is transferred to the High Court for enforcement and the land or property is situated in the area of a District Registry, the transfer is to that District Registry and any applications to the High Court in relation to the proceedings – eg, an application for a stay of the writ – must be made to that District Registry. [2] HM Courts and Tribunals Service has produced a short explanatory note on the changes to writs of possession. [3]

Granting a possession order should not, however, be seen as the end of the line. Even when this has occurred, lenders still do not want to repossess homes unnecessarily and it may be possible to negotiate terms directly with the creditor that are more acceptable than those imposed by the court. Such variations should at least be agreed in writing and the court asked to vary the relevant order, with the consent of the other party if possible (see here).

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1 r.83.8A (2)(b) & (3) CPR

2 r6 Civil Procedure (Amendment No.3) Rules 2020

3 Available at assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/911646/Writs_of_Possession.pdf

Arguing against a possession order

In some cases, the situation when the loan was made is relevant. In particular, if a client was badly advised to take out a new secured loan by a financial adviser or the lender itself, this should be pointed out to the court – eg, if there has been irresponsible lending. Although irresponsible lending is not a defence in itself, the early history of the loan can be vital in obtaining the sympathy of the court.

If mortgage interest should have been paid by the DWP but has not been or if a claim is pending, this should be brought to the court's attention. Similarly, if penalties have followed slow payments from the DWP, these should be challenged (and compensation sought from the DWP with the help of an MP if necessary).

If the loan is a regulated credit agreement and covered by the Consumer Credit Act, check whether the agreement has been drawn up correctly and, if not, whether this makes it irredeemably unenforceable or enforceable only if the court gives permission (see here). [1]

If the mortgage agreement was made after 1 July 1995 and its terms include 'arrears charges', 'fines' and interest penalties on early settlement, it might be possible to challenge it under the Consumer Rights Act 2015 to reduce the amount payable by the client. It may also be possible to challenge the lender's charges on the grounds that they were unreasonably incurred and/or unreasonable in amount.

Debt advisers sometimes advise their clients to agree to a suspended possession order on the grounds that this is a technicality and does no more than safeguard the lender's position. This is a very dangerous view and means that any future default in payment or the accruing of further mortgage arrears puts the client at serious risk of losing their home. If a suspended order is going to be made, the amount of instalments towards arrears should be set at a level that provides some leeway for the client faced with an unexpected and essential item of expenditure.

It is unnecessary to argue against a possession order if a time order is made. If this is the case, the order for possession should be suspended, provided the time order is complied with. A time order should always be considered (see here) in cases of regulated credit agreements and many regulated mortgage contracts treated as regulated for time order purposes.

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1 Enforcing a possession order in relation to an unenforceable agreement without obtaining the permission of the court could give rise to an unfair relationship: see *In the matter of London Scottish Finance* [2013] EWHC 4047 (Ch)

Time orders

A time order is an order that allows a court to reschedule the payments under a credit agreement regulated by the Consumer Credit Act 1974 (or, in the case of regulated mortgage contracts, treated as regulated by the Act for time order purposes). If a time order is made, a client can pay any sum owed under a regulated credit agreement by instalments, payable at whatever frequency the court thinks is 'just', having regard to the client's means and any surety. [1] In the case of possession action, the 'sum owed' is the outstanding balance of the loan.

If the only reason an agreement secured on property (eg, a 'consumer credit back book mortgage contract' – see here) is not regulated by the Consumer Credit Act is because it is a regulated mortgage contract (see here), it can be argued that it should be treated as if it were a regulated agreement for the purposes of time orders. [2] You

should get specialist advice if you are considering using this argument. [3] However, the time order provisions do *not* apply if the agreement is exempt from regulation for any other reason. [4]

Note: if the time order provisions apply, [5] you should challenge district judges who will only consider making orders for payment of contractual instalments plus arrears.

Time orders are unpopular with the credit industry. Some lenders prefer to negotiate out of court rather than have a time order, so the threat of an application can be part of the client's negotiating tactics.

Creditors often argue that courts can only make time orders in cases of 'temporary financial difficulty', but this is *not* the case. The House of Lords suggested in the *First National Bank* case that the fact that a borrower's difficulties are not temporary is not necessarily an obstacle to making a time order: '… the broad language of s129 should be so construed as to permit the county court to make such an order as appears to it just in all the circumstances' (including any amendment to the loan agreement – eg, freezing or reducing interest as it considers just to both parties). [6]

Although time orders extending over a long period are generally regarded as undesirable, in the same case, the House of Lords confirmed that the court has the discretion to make whatever

order it considers 'just' in the circumstances of the case. [7]

The Consumer Credit Act 1974 gives the court discretion to make a time order in all possession cases, involving regulated credit agreements 'if it appears to the court just to do so'. [8] To use this discretion properly, the court must consider the justice of an order in each case. The circumstances and terms of the loan, the reasons for default and the client's payment record are relevant circumstances.

Some creditors argue that, once judgment has been entered, the court no longer has the power to make a time order as there is no longer any 'sum owed' under a regulated agreement – ie, the debt is now owed under the judgment. However, section 129(2)(c) of the Consumer Credit Act 1974 says that a time order can be made 'in an action … to enforce a regulated agreement' and section 130(1) specifically allows the court to make a time order where a client has made an instalment offer in response to a county court claim. Finally, none of the House of Lords' judgments in the *First National Bank* case suggest that the court cannot make a time order in relation to a judgment debt.

If you come across a case in which the creditor denies that the court has the power to make a time order, get specialist advice.

If a time order is granted, the client's full liability to the creditor is discharged when they have made all the payments ordered. If a hearing is required, the court should transfer the hearing to the client's local court on its own initiative. [9]

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1 s129(2)(a) CCA 1974

2 s126(2) CCA 1974

3 See 'Spotlight' article, 'Time orders in mortgage possession cases', Shelter's SDAS ebulletin, July 2020

4 *FCA Handbook*, PERG 4.17.2(G). For further discussion of the implications of these provisions following the implementation of the Mortgage Credit Directive on 21 March 2016, see R Rosenberg 'Mortgages and time orders', *Quarterly Account* 50, IMA.

5 s38a AJA 1970

6 See P Madge, 'Full circle', *Adviser* 89 for a full discussion of the implications of the *First National Bank* decision. For a summary of the development of time orders, see P Madge, 'Time goes by', *Adviser* 148.

7 *Director General of Fair Trading v First National Bank* [2001] UKHL 52

8 s129(1) CCA 1974

9 r3.1(2)(m) CPR

When a time order is appropriate

A client can apply for a time order if money is owed under a regulated agreement and: [1]

- the creditor has served:
    - a default notice; *or*
    - a notice of intention to recover goods or land; *or*
    - a notice requiring early payment because of default; *or*
    - a notice seeking to terminate an agreement; *or*
- enforcement action has been taken by the creditor (including an application for an enforcement order); *or*
- the creditor has served an arrears notice, and the client has given the creditor 14 days' notice of their intention to apply for a time order and has made a repayment proposal. **Note:** A time order based on an arrears notice can only deal with the arrears. It cannot reschedule the balance of the loan.

An application for a time order is generally appropriate in the following circumstances.

- Current circumstances make payments impossible, but the client's income is likely to increase – eg, if they are currently on short-time working or experiencing a period of unemployment or benefit disqualification. Although some offer of payment must be made, a time order can still be considered, however, if there is no foreseeable improvement in circumstances.
- The original agreement was harsh on the client (eg, they were disadvantaged in negotiations or ignorant of its implications) or there is evidence of irresponsible lending. In these circumstances, the court may be sympathetic to using a time order in the interests of justice.
- An application might persuade the creditor to negotiate realistically and reduce the payments due under a regulated agreement.

Time order applications can be made for both secured and unsecured debts, although they are mainly applied for in relation to secured debts.

In *Director General of Fair Trading v First National Bank*, the House of Lords recommended that a time order application could be made where a creditor was continuing to charge contractual interest after judgment. This can be done by adding in Box 11 of Form N9A: 'I ask the court to (1) make a time order in the terms of my offer and (2) amend the loan agreement in consequence so that no further contractual interest accrues after the date of judgment.'

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1 s129(1) CCA 1974, as amended by s16 CCA 2006

Applications

An application can be made by the client after receiving a relevant notice using Form N440 if the application relates to goods. [1] For land (property), the application must be made using the CPR Part 8 procedure on form N208. A fee which is currently £377 is payable in either case (Fee 1.5). See here for details about how to apply for full or partial fee remission. The borrower is the claimant and the lender is the defendant.

An application can be useful when a lender is demanding very high payments towards the arrears, or in other ways pressurising the client, but does not start court action itself and refuses to negotiate. However, it is much more common for an application for a time order to be in response to a claim for possession.

If the lender has already issued proceedings against the client, an application for a time order can be made in the client's defence (if in time) (Question 6 on Form N11M) or on Form N244. A time order can also be applied for after the court order has been made at the hearing by way of an application to vary that order by making a time order instead. Any application for a time order should be supported by a witness statement.

The application must show that a time order is just to both the creditor and the client and indicate the terms that are required. Include:

- the circumstances of the client at the time they took out the loan, the situation now and their likely prospects for the future;
- the purpose of the loan;
- the client's payment history;
- the amount of the loan, the interest rate charged and any default charges;
- the value of the security;
- the payments that can be made now, and if and when these can be increased in the future, including a financial statement;
- the implications the time order will have on any changes required to the original agreement, particularly the extra time required and the reduction in interest rate required.

The court must be just to both parties and it therefore considers the client's position, including whether they were able to afford the agreement when they entered into it (and, if not, whether there is evidence of irresponsible lending), whether the cause of the arrears is temporary and

whether they will be able to afford to resume at least contractual payments at a foreseeable future date.

The court also considers whether there is adequate security for the lender and how the interest rate charged compares with that of other lenders.

Example

A couple took a secured loan at 28 per cent APR to pay for double glazing and maintained payments for 18 months. The wage earner then had a serious accident and was unable to work. She should be fully recovered in about nine months when she will resume employment and the contractual payments. The loan is secured against the couple's home, which has adequate equity. On these facts, a court is likely to grant a time order.

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1 For practical guidance on making a time order application, see S Coles, 'Time orders: what's all the fuss?', *Quarterly Account* 11, Institute of Money Advisers

The amount due

A time order can be made for 'the sum owed'. This phrase was once the subject of much dispute, but its meaning was eventually clarified by the Court of Appeal. It means 'every sum which is due and owing under the agreement'. If possession proceedings have been brought, this is the total indebtedness, and this was confirmed in the *Barnes* case (see here). For unsecured regulated loans, it is usually the total amount due.

The amount due (and subject to a time order) is therefore the sum of:

- the amount borrowed; *and*
- the total charge for credit (early settlement rebates should not be applied to this); *and*
- any default interest properly charged up to the hearing date; *less*
- all payments made to date.

The lender should make clear to the court the total sum owed and the present arrears as well as the contractual instalments. Check these calculations, if possible. The lender should also be asked to confirm in writing:

- if the client makes the contractual payments plus £x towards the arrears, how much they will still owe at the end of the loan repayment period; *and*

- the monthly payment the client needs to make to repay the loan by the end of the contractual period.

How much to offer

The offer of payment should be according to the client's ability to repay and personal circumstances. In *Southern and District Finance v Barnes*, an order was made for £25 a month for six months, then nearly £100 a month for the remaining 174 months. [1]

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1 *Southern and District Finance v Barnes* [1995] CCLR 62, CA. See 'Case law and important decisions', Shelter's SDAS ebulletin, May 2023, for a summary of this key case when applying the time order provisions. This has been produced by SDAS because the judgment is no longer available.

Varying other terms

Having decided the instalments and their timing, the court can also amend either the rate of interest or the length of the loan, provided it is 'just to both parties and a consequence of the term of the order'. [1] It is important to demonstrate that a reduction in interest is a necessary consequence of a reduction in payments in order to prevent a loan running for too long. This may simply be a reduction in interest on the arrears, or a reduction in interest on the arrears and principal during the period of reduced payments, or a longer term reduction. Otherwise, if a time order is made that, for example, reduces payments for a fixed period but does not deal with interest for that period, the monthly instalments could increase considerably when the time order expires.

The court does not have the facilities to calculate interest charges. You could consider approaching your local trading standards office for help with this or asking the court to require the lender to make the necessary calculations.

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1 s136 CCA 1974

Reviews

A time order can be varied or revoked by the court on the application of a creditor or client. [1]

This power to review should be sufficient to persuade district judges who resist time orders that one can safely be granted because it can later be reviewed.

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1 s130(6) CCA 1974

After property has been repossessed

A warrant of possession is executed on the date and time stated in the warrant. An enforcement agent comes to the property accompanied by a locksmith and a representative from the lender. The enforcement agent may use force to enter the property and evict all the occupants. If opposition is expected, the enforcement agent may be accompanied by a police officer to prevent a breach of the peace (not to enforce the eviction). The locksmith changes the locks. Any of the client's property left in the home will therefore be locked inside. The client can ask the lender for access to the home to remove her/his property within a reasonable period, usually two weeks.

Once a warrant has been executed, the court cannot suspend the possession unless:

- the original possession order itself is set aside; *or*
- the warrant has been obtained by fraud; *or*
- there has been oppression or abuse of process in its execution. Court staff providing misleading information could amount to 'oppression', but unless there has been 'fault' on the part of the lender or the court, there is no abuse of process. [1]

The property is then sold by the lender (called the 'mortgagee in possession'), which has the following responsibilities.

- The lender must take proper care of the property. This includes making essential or emergency repairs (eg, mending a leaking pipe) and may include simple maintenance (eg, mowing the lawn, painting the windows), but not include improvements – eg, refitting the kitchen.
- The lender must sell the property at the best price reasonably possible. If it does not do so, the client can complain to the Financial Ombudsman Service. [2] Most lenders get at least two valuations to ensure the price is fair and sell through an estate agent in the usual way. Sale by auction is usually considered to achieve a fair market price, although a reserve price is set.
- The lender should sell the property as soon as possible. The lender is not under an obligation to delay the sale in the hope of obtaining a better price. The lender must balance the need to

prevent the debt increasing with market factors.

- The lender must account to the client for money received and charged in respect of the property (see below). [3]

After the sale of the property, the lender balances the payments and proceeds of the sale against the outstanding mortgage (the 'account'). The sale proceeds are applied first to any arrears of interest and are usually sufficient to cover these, so that any shortfall is likely to consist of the capital borrowed.

If the mortgage is less than the payments and proceeds of sale, the balance should be paid to the client as soon as reasonably possible. If the mortgage is more than the payments and proceeds, the client should be informed as soon as possible and asked to make up the difference, usually referred to as a 'mortgage shortfall' debt. [4] In order to recover any debt, the lender must produce an account to show all payments made and proceeds of the sale versus the amount of the mortgage and its other costs to show the balance outstanding.

The client is legally obliged to repay the mortgage and all the costs associated with recovering the debt. Once the property has been sold, the shortfall debt is unsecured. Although the lender should inform the client of the amount of the shortfall as soon as possible after the sale, inevitably the client will have moved and, in the absence of a forwarding address, it may take some time to trace them. It is not unusual for people to remain unaware of the shortfall debt for several years.

Many lenders do not take any action immediately following a forced sale because they recognise the client is likely to have financial problems that caused the arrears and therefore could not afford to pay anything anyway. However, many lenders keep records of repossessed borrowers and are likely to attempt to recover any shortfall at a later date when either their situation is known to have improved or the general economic situation is better. It is also possible that such lenders could sell these debts at a later date to companies whose standards of collection are more draconian than those of the original mortgage lender. If the lender decides to recover the shortfall from the client, it must inform them of this decision within six years of the date of sale.

It is, therefore, vital to advise a client whose home is sold by a secured lender that there may be future attempts by the lender to recover this money.

For more details on dealing with mortgage shortfall debts, see here.

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1 *Cheltenham and Gloucester Building Society v Obi* [1996] 28 HLR 22. Where the lender executed a warrant of possession after the borrower had telephoned it and paid off the arrears as arranged, the court set aside the warrant as an abuse of process: *Blemain Finance v Ridley*,

Darlington County Court, 2012, unreported (*Adviser* 155 abstracts).

2 See, for example, 'Complaint relating to possession of a property - and its subsequent sale below market value', *Ombudsman News* 103/11, June/July 2012

3 See A Walker, 'Movin' on - the mortgagee in possession', *Quarterly Account* 50, IMA

4 For a full discussion of this issue, see D McConnell, 'No equity?', *Adviser* 53