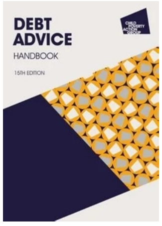

The content

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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1. Housing debts

Mortgage

Usually, the term 'mortgage' describes a loan to buy a house or flat. If repayments are not maintained, the lender can recover the money lent by repossessing the property and selling it. A 'charge' is registered on the property to safeguard the rights of the lender. A 'first mortgage' is the original mortgage taken out on a property (usually to finance the purchase of the property); any mortgages created subsequently while the first mortgage remains in place are usually referred to as 'secured loans', a practice followed in this *Handbook*.

The legal position

First mortgages from building societies and the major banks are exempt from regulation by the Consumer Credit Act 1974 (see here). Since 31 October 2004, most mortgage lending (including arranging and administering mortgages) is regulated by the Financial Conduct Authority (FCA).

Firms involved in mortgage-related activities must be authorised by the FCA. If they are not, they commit a criminal offence and any regulated mortgage contract cannot be enforced, unless the court is satisfied that it is 'just and equitable' to do so. You can check whether a lender or intermediary is authorised at fca.org.uk/firms/financial-services-register.

A mortgage is a regulated mortgage contract if it was taken out on or after 31 October 2004 and:

- the borrower is an individual – ie, they are acting as a consumer and not for business purposes; *and*
- the loan is secured by a first mortgage on a property; *and*

- the property is at least 40 per cent occupied (or is intended to be occupied) as a dwelling; *and*
- not where a loan is secured on residential property and the borrower entered into the loan agreement wholly or predominantly for the purposes of a business carried on by them and they are not going to occupy any of the property but, for example, are going to sell it to a third party.

Since 21 March 2016, secured loans which are not first mortgages are also regulated mortgage contracts if they meet the critera above and:

- the loan was made before 21 March 2016 and was a regulated credit agreement when it was made and so covered by the Consumer Credit Act 1974; *or*
- the loan was made after 21 March 2016, but would have been a regulated agreement and covered by the Consumer Credit Act 1974 if it had been made before this date.

Special features

There are a variety of different mortgages.

- **Capital repayment mortgage.** The amount borrowed ('capital') is repaid gradually over the term of the mortgage. Initially, repayments comprise virtually all interest, but towards the end of the term of the mortgage they are virtually all capital.
- **Low-start/deferred-interest mortgage.** Reduced interest is charged for the first two to three years. In some schemes, interest accrues during the first few years, but payment is spread over the remaining term of the mortgage. They are only helpful for people who expect their income to increase so that they can afford the rise in repayments after the first few years. These are sometimes known as 'discount-rate mortgages'.
- **Interest-only mortgage**. The client only pays interest on the loan during the term of the mortgage. This means that they pay lower monthly repayments during the term of the mortgage, but nothing towards the capital sum originally borrowed. So unless the client has a vehicle to repay the capital at the end of the mortgage term, such as an insurance policy, or has access to a lump sum, they may have to sell the property to repay the original loan. If your client is in this situation, refer to the FCA consultation on interest-only mortgages (May 2013) at fca.org.uk/publication/guidance-consultation/gc13-02.pdf. [1]
- **Fixed-rate mortgage.** The interest rate is fixed for a number of years, either at the outset or during the life of the loan. They are obviously more attractive during a period when interest rates are rising.
- **Tracker mortgage.** These mortgages guarantee to follow the Bank of England's base rate or some other rate up or down, maintaining the same differential between the rate charged and that set by the Bank of England.

- **Endowment mortgage.** Repayments cover the interest on the capital borrowed and separate payments are made to an insurance company for the endowment premium. The capital is repaid at the end of the mortgage term in one lump sum from the proceeds of the insurance policy. Endowment policies aim to pay off the mortgage capital when they mature and produce extra capital for the borrower to use as they wish. However, there is no guarantee that the policy will pay off even the capital, let alone provide extra money. Any client with an endowment mortgage should contact the policy provider and enquire how much the policy is expected to produce on maturity, and get independent financial advice if a shortfall is predicted.
- **Pension mortgage.** The borrower pays interest only to the lender and a separate pension premium, which attracts tax relief. When it matures, the cash available from this pension pays off the capital on the mortgage and the rest funds a personal pension plan.
- **Other types of mortgage.** These include 'capped rates', where repayments do not exceed a set level (the 'cap'), or 'collared rates', where payments do not fall below a set level (the 'collar').

See here for mortgage shortfalls after a property is repossessed.

Regulated mortage contracts

Generally, lenders and intermediaries must conduct their business with integrity, consider the interests of clients and treat them fairly. The detailed rules are set out in the FCA's *Mortgages and Home Finance: conduct of business sourcebook* (MCOB), available at handbook.fca.org.uk/handbook/MCOB.pdf.

The following has applied since 26 April 2014. [2]

- Lenders are fully responsible for assessing whether a client can afford the loan and must verify the client's income. Although lenders can use intermediaries in this process, the lender remains responsible.
- Lenders can grant interest-only mortgages, but must have evidence that the client has a credible repayment strategy.
- When taking account of the client's income and/or assets for an affordability assessment, lenders must obtain independent evidence. They must verify the client's income and not rely on a client's (or their representative's) declaration of affordability or the client's self-certification of income.

Lenders must deal fairly with clients in arrears, and have a written arrears policy in place. This requires the lender to use reasonable efforts to reach a repayment agreement with the client, liaise with advisers and apply for repossession only when all other reasonable attempts to resolve the situation have failed. Within 15 business days of the account falling into arrears (defined as the equivalent of two monthly payments), the lender must send the client a copy of the FCA's information sheet on mortgage arrears, together with a statement of account, including details of the arrears, charges incurred and the outstanding balance. This information must be provided at least quarterly and, even if a repayment arrangement is in place, the information must still be sent out quarterly if the account is attracting charges.

From 30 June 2010, lenders must not charge arrears fees if the client is complying with an arrangement to pay those arrears. [3] Lenders must not pressurise clients through excessive telephone calls or letters and must not contact them at unreasonable hours ('reasonable hours' are defined as 8am to 9pm). Lenders must not use documents that look like court forms or other official documents containing unfair, unclear or misleading information designed to coerce the client into paying.

If a lender does not comply with the above rules, the client could make a complaint, or complain to the Financial Ombudsman Service if the matter cannot be resolved with the lender or intermediary. [4]

If a property is repossessed, the lender must market it as soon as possible and obtain the best price that might reasonably be paid. However, the lender can take account of market conditions or other factors that might justify deferring a sale.

There is industry guidance on arrears and possessions to assist lenders to comply with Part 13 of the MCOB and their duty to treat customers fairly. [5] This document also contains examples of good practice and is an essential reference for advisers (see here).

Tailored support (post-pandemic and cost of living)

The FCA aims to ensure that clients affected by the coronavirus pandemic continue to be offered the support they need. This support is tailored to their needs: the FCA calls this 'tailored support'. It could potentially involve extended payment deferrals that will need to be reported on the client's credit reference file.

The FCA's additional tailored support guidance, effective from 1 April 2021, remains in force until varied or revoked. [6] It applies in addition to the MCOB provisions, in particular MCOB 13. The FCA expects lenders to be flexible, not to take a 'one size fits all' approach and to use of a range of short- and long-term options, including:

- providing appropriate forbearance (ie, refraining from exercising a legal right, especially enforcing payment of a debt) that is in the client's interests after consideration of their individual circumstances. Lenders should not repeatedly pursue the same forbearance option without reconsidering whether it remains appropriate or whether to explore an alternative option;
- supporting clients through a period of payment difficulties and uncertainty, including by

considering their other debts and essential living costs;

- recognising and responding to the needs of vulnerable clients, especially those with 'protected characteristics' under the Equality Act 2010, such as physical or mental health disabilities;
- having systems, processes and adequately trained staff in place;
- reviewing arrangements regularly and, where a client's circumstances have changed, reconsidering what support they need.

Lenders are also expected to offer clients support to manage their finances, such as signposting to money guidance or referring them for debt advice.

Unless a client is unreasonably refusing to engage with a lender, the lender should not repossess a client's property solely on the ground that deferred payments remain unpaid. The lender's arrears and repossessions policy should specifically address this situation.

The FCA points out that the tailored support guidance continues to apply and lenders are still expected to consider appropriate forbearance arrangements for clients in financial difficulties and not to repossess a property unless all other reasonable attempts to resolve the position has failed. This is in line with the commitment made by signatories to the *Mortgage Charter* with effect from 26 June 2023 not to repossess a property within 12 months of a missed payment without the client's consent except in exceptional circumstances. You can view the *Mortgage Charter* at tinyurl.com/3mwvw5ht.

The FCA has stated that the tailored support guidance is also applicable to support to borrowers who are strugging with payments because of the cost of living crisis. You can view the final version of the guidance at tinyurl.com/52javrx6. [7] The FCA points out that there are many different types of forbearance and that lenders are not limited to the options set out in MCOB 13.3.4AR.

Forbearance may be appropriate for borrowers who have not yet missed a payment, but indicate they are experiencing, or expect to experience, payment difficulties due to the rising cost of living. Forbearance may also involve contract variations such as term extensions or temporary switches to interest only. The Financial Ombudsman Service has published guidance (including case studies) on its approach to complaints about financial difficulties in relation to mortgage debt. [8]

The FCA amended its responsible lending rules in MCOB 11.6.3R from 30 June 2023 to support the implementation of the government's *Mortgage Charter.* [9] These changes mean that lenders do not need to undertake an affordability assessment as would usually be required under MCOB 11.6.2R when varying a mortgage agreement to enable a borrower to:

- reduce their capital repayments under a repayment mortgage (including to zero or paying interest only) for up to six months;
- fully or partly reverse a term extension within six months of extending the term.

Previously, MCOB 11.6.2R was only disapplied where the variation was made solely for the purposes of forbearance where the borrower was already in arrears or to avoid the borrower falling into arrears, but it is now more widely available.

This will allow borrowers a temporary, contractual reduction in their monthly mortgage repayments, but they should be made aware that this will involve higher monthly payments after the temporary period is over and higher overall costs over the remaining term of the mortgage. Lenders need to ensure that borrowers are provided with sufficient information to enable them to make an informed decision. These new rules will be reviewed after 12 months.

Mortgage prisoners

The FCA has introduced rules to help clients who are up to date with their mortgages, but who have been unable to switch to cheaper loan deals because of changes to lending practices during and after the 2008 financial crisis and the subsequent tightening of lending standards. [10] This group of borrowers are often referred to as 'mortgage prisoners' .

Mortgage lenders can provide 'more affordable mortgages' where:

- the new mortgage has a total lower expected cost and lower interest rate over the deal period (or whole term if there is no deal period) than the current mortgage; *and*
- the typical monthly payment over the new mortgage (during the deal period or if there is no deal period over the whole mortgage term) is lower than the monthly payment made in every one of the last 12 months under the current mortgage.

The rules apply where the client:

- has a current mortgage; *and*
- is up to date with their mortgage payments; *and*
- does not want to borrow more, other than to finance any relevant intermediary, product or arrangement fee for the mortgage; *and*
- is looking to switch to a new mortgage deal on their current property.

The rules also apply to interest-only mortgages. The lender can extend a mortgage term but must warn the client if this would extend borrowing into retirement.

The modified 'affordability assessment' cannot be used when the client is looking to switch to a new mortgage on a new property. The new mortgage deal does not have to be with the same lender. While these rules may help many clients obtain cheaper remortgages, they do not help those with arrears and are unlikely to help those in negative equity.

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1 See also A Walker, 'Capital punishment - interest-only mortgages at the end of the term', *Quarterly Account* 65, IMA

2 *FCA Handbook*, MCOB 11.6

3 See complaint to Financial Ombudsman Service (*Adviser* 154 abstracts)

4 See P Bristow, 'One-stop complaints shop', *Adviser* 107, and S Quigley, 'Removing the barriers', *Adviser* 109

5 Council of Mortgage Lenders guidance, available at cml.org.uk/policy/guidance/all/industry-guidance-on-arrears-and-possessions-to-help-firms.

6 fca.org.uk/publication/finalised-guidance/consumer-credit-coronavirus-tailored-support-guidance-jan-2021.pdf

7 FCA, *Guidance for firms supporting their existing mortgage borrowers impacted by the rising cost of living,* FG 23/2, March 2023

8 *Ombudsman News* issue 177, available at financial-ombudsman.org.uk/data-insight/ombudsman-news

9 HM Treasury, *Mortgage Charter*, June 2023, available at gov.uk/government/publications/mortgage-charter

10 *FCA Handbook*, MCOB 11.9, which came into effect on 28 October 2019

Checklist for action

Advisers should take the following action.

- Consider whether emergency action is necessary (see Chapter 8).
- Check liability. If possession proceedings have started, see Chapter 13.
- Assist the client to choose a strategy from Chapter 8, as **this is a priority debt if the debt is secured on the client's current home**. Otherwise, the arrears are a non-priority debt. Assist the client to choose a strategy from Chapter 9.

Mortgage shortfall

If a property has been repossessed by the lender and the outstanding balance due under the mortgage is more than the proceeds of sale, this is known as a 'mortgage shortfall'. A client who hands in their keys to the lender remains liable for any subsequent shortfall as their contractual liability remains.

The legal position

Provided the loan remains secured, the lender has 12 years to take action to recover the principal amount (ie, the capital sum borrowed) and six years to recover arrears of interest. This limitation period (see here) starts again every time the client or their representative acknowledges the debt (see here). The limitation period for the principal (but not the interest) also starts again every time the borrower, a joint borrower or agent makes a payment into the account (including payments of mortgage interest by the DWP [1]). Once the limitation period has expired, it cannot be started again by further payments or acknowledgements.

In 1997, a judge in the Court of Appeal suggested that it was 'seriously arguable' that the six-year limit applied to the principal as well as to the interest. [2] After a period of considerable uncertainty, the Court of Appeal and House of Lords resolved the issue.

- The limitation period for the principal sum borrowed is 12 years from the date when the sum became payable under the terms of the mortgage deed, usually after the client has failed to pay two or three monthly instalments. [3]
- The limitation period for the interest is six years from the date when the lender had the right to receive that interest. [4]
- The fact that a mortgage deed contains an express provision under which the borrower agrees to pay any shortfall to the lender does not give the lender a fresh right of action starting on the date of sale. [5]
- The position is the same for loans that are regulated credit agreements covered by the Consumer Credit Act 1974 [6] or in situations where the mortgage deed contains no covenant allowing the lender to call in the mortgage on default but it has, nevertheless, repossessed and sold the property. [7]
- The proceeds of sale are treated as appropriated first to arrears of interest and then to capital. [8]

In most cases, the shortfall is made up of capital only because the interest will have been paid from the sale proceeds, and the whole debt is subject to a 12-year time limit. This should, however, be checked with the lender.

If there is a regulated mortgage contract (see here), the lender must notify the client of its intention to recover the shortfall within six years of the date of sale of the property. [9]

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1 *Bradford and Bingley v Cutler* [2008] EWCA Civ 74

2 *Hopkinson v Tupper*, 30 January 1997, unreported (*Adviser* 63 abstracts)

3 s20(1) LA 1980

4 s20(5) LA 1980

5 *Bristol and West plc v Bartlett*, 31 July 2002, unreported (*Adviser* 94 abstracts). For a full discussion of the issues, see P Madge, 'Out of the bBlue', *Adviser* 61, and P Madge, 'About Face', *Adviser* 94.

6 *Scottish Equitable v Thompson* [2003] EWCA Civ 225

7 *West Bromwich Building Society v Wilkinson* [2005] UKHL 44

8 *West Bromwich Building Society v Crammer* [2002] EWCA 2618 (ChD)

9 Under Part 13.6.4 of the *FCAHandbook*, MCOB

Special features

A mortgage shortfall debt is, in many ways, no different from any other unsecured debt, since once the property has been sold, it is no longer a priority debt. The strategies, tactics and principles of good money advice described throughout this *Handbook* still apply. However, the debt is often disproportionately high compared to the client's usual income, expenditure and any other debts. It can be very distressing for clients to be faced with such a huge debt. [1]

Some lenders will already have a county court judgment for money. This does not prevent the client from using any of the strategies detailed but, in addition, you may need to protect the client's interest by applying to vary or suspend the judgment. This is essential if the lender attempts to enforce it (eg, by an attachment of earnings order) as the Limitation Act does not apply to enforcement action. Clients who have acquired assets, particularly another property, may be especially vulnerable. If possible, the client should resolve the shortfall debt before acquiring further assets, such as a house or flat.

It is not unusual for clients to fail to give the lender details of their new address. Some may hope they will not be found. Before entering negotiations, always check whether MCOB 13.6.4R applies (see here).

It may be necessary to contact the lender to obtain information (taking care not to acknowledge the debt and restart the limitation period). The information required may include:

- copies of any letters written by the lender to the client, which could confirm whether or not MCOB 13.6.4R applies (this came into force on 6 April 2007) or possibly the 'CML agreement' where the mortgage was not a regulated mortgage contract or the sale took place before 6 April 2007; [2]
- a copy of the lender's 'completion statement' following the sale of the property, which will confirm the breakdown of the shortfall;
- a full statement of account, which will confirm when the last payment was made into the account by any of the borrowers;
- copies of any letter(s) received by the lender from the client, which could be acknowledgements.

Additional information may also be required, and you may need to get specialist advice if you are unsure how to proceed.

Mortgage indemnity guarantee

Most mortgage lenders have a normal lending limit of 70–80 per cent of the property's value. If someone wants to borrow a higher proportion (eg, 95–100 per cent), the lender asks the borrower to buy an insurance policy to protect it against a mortgage shortfall. This is the mortgage indemnity guarantee (or indemnity insurance or building society indemnity). The insurance premium is usually paid as a lump sum of several hundred pounds at the time of purchase. **Note:** this insurance is intended to protect the lender, not the borrower. The only value to the borrower is that, without agreeing to pay the insurance premium, they may be refused the amount of mortgage.

The mortgage indemnity guarantee does not pay the full shortfall. The amount paid is a proportion of the shortfall relative to the lending risk. Therefore, there will still be a shortfall owing to the lender.

However, the insurance company can pursue the client for the money paid towards the mortgage shortfall. In some cases, the client may receive a demand for money from the insurer, even though the lender has agreed not to pursue the shortfall. Alternatively, some insurers appoint the lender to collect a client's liability on their behalf. In this case, the lender contacts the client to ask for payment of the entire shortfall. Commonly, the client can expect to receive a demand from the insurer and the lender for their respective proportions of the shortfall. These cannot be ignored and must be dealt with.

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1 See complaint to Financial Ombudsman Service (*Adviser* 154 abstracts)

2 This was a concession made by the Council of Mortgage Lenders (now part of UK Finance) under which it agreed that, with effect from 11 February 2000, its members (in practice, all the major high street banks and building societies) would not pursue a mortgage shortfall unless the client had been contacted within six years of the date of sale of the property.

Checklist for action

Advisers should take the following action.

- Check if a breathing space application would be appropriate (see here).
- Check liability, including whether the debt is unenforceable because the creditor has not taken recovery action within the appropriate time limit – ie, six years from the date of sale of the property when MCOB 13.6.4R applies and 12 years for the capital (six years for interest) when the Limitation Act 1980 applies (see here).
- Assist the client to choose a strategy from the list below or one of the other strategies in Chapter 9, as this is a non-priority debt. See also Chapter 10 for insolvency options.

Consider the following strategies.

- **Write-off.** A total write-off is likely to be the most appropriate strategy if it can be demonstrated that the client has no available income or assets and that the position is unlikely to improve (see here). In other cases, pressure should be brought (perhaps by using publicity or local politicians) to highlight the unfairness of seizing a person's home and also expecting repayment of the shortfall.
- **Debt relief order (DRO).** A mortgage shortfall debt is a qualifying debt for a DRO (see here).
- **Bankruptcy** (see Chapter 10). Personal bankruptcy legally and finally ends the shortfall debt recovery process. It is usually appropriate when the lender/insurer insists on pursuing the claim, bankruptcy would not adversely affect the client, and they need the peace of mind and fresh start that follows.
- **Individual voluntary arrangements** (IVAs – see Chapter 10). An IVA is usually only appropriate if the shortfall is modest and in proportion to other unsecured debts, and the client can afford substantial repayments and/or owns a home that would be at risk in bankruptcy proceedings, or if the lender obtained a charging order (see here).
- **Full and final settlement** (see here). Most lenders and insurance companies will agree to accept a smaller sum than the full outstanding shortfall debt. How much is acceptable depends on individual circumstances. For example, if there are no other debts to be dealt with

or actual bankruptcy is not a realistic option (eg, implications for employment), a client could consider negotiating with the lender to accept the bankruptcy fee (£680) as a 'full and final' settlement figure. Settlements in the region of 10 to 50 per cent are not uncommon. You should ensure that any full and final settlement agreement includes the claims of both the lender and any insurer, and that the agreement is binding on them. **Note:** a lender who cashes a cheque sent in full and final settlement is not necessarily prevented from pursuing the balance, although cashing the cheque is strong evidence of acceptance unless there is an immediate rejection of the offer.

- **Instalment payments.** Many lenders will accept modest monthly payments towards a substantial debt, where a client's personal circumstances show this to be reasonable. The client may find it daunting to be asked to pay, for instance, £20 a month towards a debt of £35,000 because they cannot see an end. On the other hand, many lenders see token payments as recognition that the client is being responsible about the shortfall. You should suggest that, provided the client keeps up the payments for, say, five years, the lender should accept this as full and final settlement and agree to write off the balance. For more information about partial write-offs, see here. If the client has other non-priority debts and the mortgage shortfall is to be included in a pro rata payment arrangement, you should attempt to agree a total figure that the lender is prepared to accept for inclusion in the financial statement, on the basis that the balance will be written off on completion of the payment arrangement.

When preparing a strategy, bear in mind that if there was a mortgage indemnity guarantee, there might be two separate demands to negotiate – one from the lender and one from the insurer.

Rent

Rent is payable by tenants to landlords in exchange for the use of their property. A landlord may be a private individual, a property company or a public sector landlord, such as a local authority or housing association.

The legal position

Rent is payable under a tenancy agreement (whether written or oral). For details of tenancy agreements, see *Defending Possession Proceedings*, published by Legal Action Group (see Appendix 2).

Special features

After the termination of a tenancy (eg, because a notice to quit is served), a tenant can remain in possession of the home because of protection given by legislation. In these circumstances, the landlord may refer to the money due in exchange for possession of the home as 'mesne profits'. For practical purposes, this is the same as rent. Similarly, if a person is a licensee rather than a tenant, what they pay is not strictly rent, but a charge for use of the property. Arrears of payment due under a licence are treated in the same way as rent when giving debt advice.

Checklist for action

Advisers should take the following action.

- Consider whether emergency action is necessary (see Chapter 8).
- Check if a breathing space application would be appropriate (see here).
- If the client is a social housing tenant, check the landlord's policy on rent arrears and DRO applications. Some social landlords will agree to write off rent arrears accrued at the point of DRO application. However, their agreement may be on the understanding that the client will keep up with future rent payments.
- Check liability. If possession proceedings have started, see Chapter 13.
- Assist the client to choose a strategy from Chapter 8, as **this is a priority debt if the rent is due on the client's current home**. Otherwise, the arrears are a non-priority debt. Assist the client to choose a strategy from Chapter 9.

Secured loan

A secured loan (often known as a second mortgage) allows a homeowner to take out a (further) loan, using the property as security. The lender takes a legal charge on the property, with a similar right to repossess as the bank or building society holding the first charge on the property (in some cases, the creditor may also hold the first charge). If a property is repossessed and sold, the proceeds are distributed to meet the claims of secured lenders in the order in which loans were given.

Note: the FCA has reminded lenders they should provide support to borrowers who are affected by the rising cost of living and struggling with payments. The FCA has stated that the existing tailored coronavirus support guidance (see here) is also applicable to the cost of living crisis.

The legal position

There are three categories of secured loans.

- **Regulated mortgage contracts**. A secured loan is a regulated mortgage contract if:
  - it was taken out by an individual (ie, someone acting as a consumer and not for business purposes);
  - it was either a regulated credit agreement when it was made or, if made on or after 21 March 2016, would otherwise have been a regulated credit agreement;
  - it is secured on residential property – ie, at least 40 per cent of the property is occupied (or intended to be occupied) as a residence (but not where a loan is secured on residential property and the borrower entered into the loan agreement wholly or predominantly for a business carried out by them and they are not going to occupy any of the property).
- **Regulated credit agreements**. Unless it is exempt (see here), the agreement is a regulated credit agreement if the loan was for £25,000 or less (if taken out before 6 April 2008) or £15,000 or less (if taken out before 1 May 1998). If the agreement was made between 6 April 2008 and 21 March 2016, the agreement is regulated regardless of the amount (but see 'consumer credit back book mortgage contracts' on here).
- **Unregulated agreements**, if neither of the above apply. According to the *Perimeter Guidance* (PERG) (which is part of the *FCA Handbook*), to meet the definition of a regulated mortgage contract, the agreement must meet the definition of a regulated mortgage contract at the time it was entered into. Agreements that do not start as regulated mortgage contracts cannot subsequently become so, even if they now meet the conditions for a regulated mortgage contract that apply with effect from 21 March 2016 (see PERG 4.4.3G).

Note: the changes introduced by the European Commission Consumer Credit Directive to pre-contract information on here do not apply to secured loans.

Special features

Interest rates on secured loans with finance companies are much higher than those charged by building societies or banks for first mortgages. Loans are often repayable over a much shorter term than for first mortgages, and this, together with higher interest rates, means it is an expensive form of borrowing.

Before 26 March 2016, there were special rules for entering into secured loans regulated by the Consumer Credit Act 1974. The borrower must be given a copy of the agreement, which must not be signed for seven days. They must then be sent a copy for signing and left for a further seven days. If the borrower does not sign, there is no agreement. The lender should not contact the prospective borrower during either of the seven-day 'thinking' periods unless asked to do so. If these rules were not followed, the loan is not enforceable without a court order.

Checklist for action

Advisers should take the following action.

- Consider whether emergency action is necessary (see Chapter 8).
- Check if a breathing space application would be appropriate (see here).
- Check liability, including whether the agreement is enforceable under the Consumer Credit Act 1974.
- Assist the client to choose a strategy from Chapter 8, because **this is a priority debt**.