

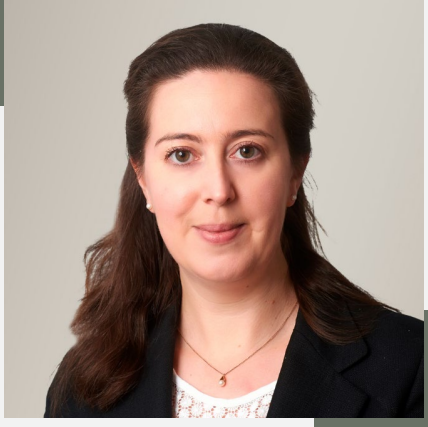
Landmark Chambers'

Property Law Nuts & Bolts seminar series, Part 1: Mortgage Possession Proceedings

The recording may be accessed [here](#).



Your speakers today...



Jacqueline Lean (Chair)



Evie Barden

Topic:
Key Defences



Brooke Lyne

Topic:
Practical Tips and Tricks



Edward Arash Abedian

Topic:
An Introduction to Mortgage
Possession Claims



An Introduction to Mortgage Possession Claims



Edward Arash Abedian



What we will cover

- What is a mortgage?
- What are a lender's rights under the mortgage?
- What is the right to possession?
- How do you start a mortgage possession claim?



What is a mortgage?

- Form of security where one party transfers ownership over their property as a security for the performance of an obligation
- Most commonly: legal charge over a property as security for repayment of a loan which facilitated the property's purchase, or legal charge over property securing business lending
- Mortgagee = lender
- Mortgagor = borrower
- Legal mortgage = charge created by deed, expressed to be by way of legal mortgage, and registered at the Land Registry (s.87, LPA 1925)



Lender's rights and remedies

- Sell the property to realise the security
- Appoint a receiver
- Enter into / seek an order for possession
- Sue the borrower under the covenant to repay the loan
- Seek foreclosure (rare)



The right to possession

“Where a mortgagee takes actual possession of the property, there is no doubt as to his intention to take possession, and he thereby assumes the liability of a mortgagee in possession. Where he gives notice to the tenants to pay their rents to him, it is equally clear that he intends to go into receipt of rents and profits, and this, as regards the liability to account, is equivalent to taking possession. This is also the case if the mortgagee gives notice to the tenants not to pay rent to the mortgagor. [...] A receiver who, on being discharged, continues to receive the rents and pays them to the mortgagee will become the mortgagee's agent so as to put the mortgagee into possession.”

Halsbury's Laws of England, 5th ed., vol. 77 (2021)



When does the right arise?



Qualifications and restrictions

- Mortgage deed – will commonly provide that the lender will not seek possession provided that the borrower maintains the repayments due
- Regulated mortgages (Consumer Credit Act 1974) – require court order for possession
- Receiver already appointed at request of a third party
- Overriding interests
- Joint-borrowers (*Albany Home Loans Ltd v Massey* [1997] 2 All ER 609)
- Court's discretion (e.g. s.36 Administration of Justice Act 1970)
- Lender's duties and liabilities



Procedure: jurisdiction

- County court for district in which the land or any part of it is situated (CPR PD 55A)
- Proceedings to enforce a regulated agreement must be brought in the county court (s.141(10), Consumer Credit Act 1974)
- Exceptional circumstances justifying starting a claim in the High Court (e.g. complicated disputes of fact or points of general importance) must be certified on the claim form and verified by statement of truth
- Court will normally either strike out or transfer on its own initiative, but this may result in sanctions



Procedure: pre-action protocol

- Protocol applies to:
 - First charge residential mortgages and home purchase plans regulated by the Financial Services Authority under the Financial Services and Markets Act 2000
 - Second charge mortgages over residential property and other secured loans regulated under the Consumer Credit Act 1974 on residential property
 - Unregulated residential mortgages
- Does not apply to 'Buy to Let' mortgages



Procedure: pre-action protocol

- Where a borrower falls into arrears, the lender must provide the borrower with (paras 5.1-5.7):
 - The total amount of the arrears
 - The total outstanding on the mortgage or the home purchase plan
 - Whether interest or charges will be added, and if so and where appropriate, details or an estimate of the interest or charges that may be payable
 - Where appropriate, the required regulatory information sheet or the National Homelessness Advice Service booklet on mortgage arrears
 - Advice on making early contact with the Local Authority housing department, or, where necessary, refer them to appropriate sources of independent debt advice



Procedure: pre-action protocol

- The lender should consider not starting a claim for possession where (paras 6.1- 6.2):
 - Borrower has submitted a claim to an insurer under a mortgage payment protection policy;
 - Borrower has a reasonable expectation of eligibility for payment from insurer; and
 - Borrower has an ability to pay a mortgage instalment not covered by the insurance; or
 - Borrower can demonstrate reasonable steps have been/will be taken to market the property at an appropriate price in accordance with reasonable professional advice
- ADR positively encouraged (para. 7.1):
 - Extending term /changing type of mortgage
 - Deferring payment of interest due
 - Capitalising the arrears



Procedure: pre-action protocol

- If the lender decides not to postpone, it should inform the borrower of the reasons for this decision at least 5 business days before starting proceedings
- If proceedings are issued, the lender must bring two completed copies of form N123 to court to demonstrate compliance with the protocol



Procedure: the Claim

- Claim on form N5
- POC in form N120
- POC may be varied if required, but must contain the information prescribed by CPR PD 55A 55.4, including:
 - Identify the land to which the claim relates
 - State whether the claim relates to residential property
 - Grounds on which possession is claimed
 - Full details about any mortgage or tenancy agreement
 - Details of every person in possession of the property



Procedure: Particulars of Claim

POC must also give details as to:

- Whether a Class F land charge has been registered, or whether a notice under the Matrimonial Homes Act 1983 has been entered, or whether a notice under the Family Law Act 1996 has been registered
- State of the mortgage account, including:
 - The amount of the advance
 - Periodic payments and interest required
 - The amount needed to redeem the mortgage, including solicitors' costs and administration charges
- If mortgage is a regulated consumer agreement, it must state the total amount outstanding

(CPR PD 55A 5.4)



Procedure: Particulars of Claim

- If based on mortgage arrears, the POC must set out:
 - In schedule form, the dates when the arrears arose, all amounts due, the dates and amounts of all payments made and a running total of the arrears
 - Details of all other payments to be made and claimed
 - Any relevant information about the borrower's circumstances, including details about social security payments
 - Any previous steps taken to recover arrears, with full details of any court proceedings
- Any other persons who are known to be claiming an independent right to occupy should be joined as defendants
- Not necessary to claim interest and costs (usually entitled under terms of mortgage)



Procedure: notification

- Claim form and POC must be served on the defendant(s) not less than 21 days before the hearing
- Within 5 days after receiving notification of the date of the hearing by the court the lender must send a notice to:
 - the property addressed to “the tenant or the occupier”
 - the housing department of the local authority within which the property is located; and
 - any registered proprietor (other than the claimant) of a registered charge over the property
- Notice must state (CPR 55.10(3), (3A)):
 - That a possession claim for property has started
 - Name and address of claimant, defendant and court which issued the claim form
 - Details of the hearing
- Lender must produce a copy of the notices and evidence of service at the hearing

(CPR 55.10)



Key Defences



Evie Barden



What will we look at?

- (1) Rights under the mortgage?
- (2) Equitable defences
- (3) Time to pay
- (4) Who else might be in occupation?



What are the lender's remedies?





What does the charge say?

- Right to possession “before the ink is dry”? *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317
- BUT are there any restrictions in the charge?
 - Loan payable by instalments?
 - Notice?
 - Jurisdiction clauses?
- **NB:** different defences to the money claim and the possession claim?



Limitation?





Undue influence

Royal Bank of Scotland plc v Etridge (No 2) [2001] UKHL 44; [2002] 2 AC 773 at [8] – [33]; [44] - [49]:

1. Was the transaction brought about by the exercise of undue influence of one person on another? Could be actual undue influence or presumed undue influence.
2. Did the lender have actual or constructive notice of the undue influence?
3. Has the lender taken steps to remove the constructive notice?





Etridge steps

1. Independent legal advice
2. Provision of information to the wife's solicitor
3. Written confirmation





Consequences?

- The person influenced can have the mortgage set aside.
- BUT only as against their interest.
- Equitable charge against remaining interest?
- Subrogation?



Other issues

- Forgery.
- Misrepresentation: transaction is voidable
- Mutual mistake: contract can be rectified.
- Insolvency Act 1986.
- Consumer Credit Act 1974.





Section 36 of the Administration of Justice Act 1970

(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

(2) The court—(a) may adjourn the proceedings, or (b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may—
(i) stay or suspend execution of the judgment or order, or (ii) postpone the date for delivery of possession, for such period or periods as the court thinks reasonable.

(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.



Who are the proper defendants?

- Borrower?
- Occupiers? *Brighton and Shoreham Building Society v Hollingdale* [1965] 1 All ER 540
- Unauthorised tenants and Mortgage Repossessions (Protection of Tenants etc) Act
- Guarantors? Lender can pursue any or all of remedies concurrently against the debtor, its assets or the incumbered estate: *Fisher and Lightwood's Law of Mortgage* at 26.13.



Practical Tips and Tricks



Brooke Lyne



Before Proceedings are Issued

Lender

- Careful check on ability to enforce
- Strict compliance with pre-action protocol
 - Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property



Before Proceedings are Issued

Borrower:

- Not burying one's head in the sand!
- Obtaining early advice wherever possible
- Checking the protocol and objecting to attempts by Lender not to comply with it
- Making proposals for payment plan to pay off arrears
 - Realistic
 - Agreed in writing



Once Proceedings are Underway

Lender

- Priority will usually be to maximise the chances of a possession order at the first hearing
- Check that procedure has been strictly complied with:
 - Has service of the claim been carried out properly?
 - Check compliance with CPR 55.10(2), which provides as follows:

“(2) Within 5 days of receiving notification of the date of the hearing by the court, the claimant must send a notice to –

 - (a) the property, addressed to ‘the tenant or the occupier’;
 - (b) the housing department of the local authority within which the property is located; and
 - (c) any registered proprietor (other than the claimant) of a registered charge over the property.



Once Proceedings are Underway

Borrower

- The Priority will usually be to delay the proceedings as much as possible to give the borrower time to raise funds or sell
 - Investigate potential defences
 - Take practical steps to investigate alternative funding / put property on the market if necessary?
 - Try to agree stay of proceedings?
 - Try to agree to delay of the first hearing?
 - Can an offer or proposal be put to the lender?



Preparation for the Hearing

Lender

- Hearing bundle?
- Simplify and streamline as much as possible.



Preparation for the Hearing

Borrower

- Filing and serving a defence to the claim
 - 14 days after service of claim form (CPR 15.4 applies)
 - N11M Form + additional / bespoke Defence?
- Evidence of ability to pay / timing for payment / prospective sale?
 - Witness statement in advance of the hearing (usually at least 2 clear days before)
- Trying to agree an adjournment or stay?



At the Hearing

Lender

- Provide an updated position on arrears and redemption figure in clear format.
- Provide a copy of the pre-action protocol checklist.
- Produce at the hearing copies of notices under CPR 55.10(2) and evidence that they were served (CPR 55.10(4)).



At the Hearing

Borrower





- Is the claim genuinely disputed on grounds that appear to be substantial (CPR 55.8(2))?
 - Same test as for summary judgment (*Global 100 v Laleva* [2021] EWCA Civ 1835)
 - Are directions or a longer hearing appropriate?
- Raise any procedural defects or non-compliance with protocol
 - Do these justify an adjournment or stay?
- Borrower should attend court



Thank you

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