

The gloom of the current credit crunch continues to affect the UK mortgage market. The Council of Mortgage Lenders (CML) is the trade association for the mortgages industry, whose members account for 98% of all mortgage lending in the UK. The CML predicts that around 45,000 homes will be repossessed by lenders (mortgagees) in 2008, compared to 27,100 in 2007. Worryingly, at the end of 2008, around 170,000 borrowers (mortgagors) are more than three months in arrears on their mortgage payments.

This has led to some interesting legal developments. On 19th November 2008, a new **pre-action protocol for mortgage arrears** came into effect. The protocol will apply to all first charge residential mortgages in the UK. Its aim is to improve communication between lenders and borrowers, and to encourage the solution of problems with arrears at an early stage, in order to avoid, where possible, the need for repossession proceedings.

The Protocol does not alter the legal rights of the mortgagee, but it does encourage lenders to postpone possession proceedings wherever possible, particularly if the mortgagor is already trying to sell the mortgaged property him or herself. Beginning possession proceedings should be seen as a last resort by mortgagees, and when determining applications for possession of mortgaged premises, the court will look at whether (and to what extent) lenders have complied with the Protocol.

For more on the Protocol, see the CML website: www.cml.org.uk and the website of the Civil Justice Council, who implemented the Protocol: www.civiljusticecouncil.gov.uk

The Government has also been busy trying to help struggling mortgagors, and have recently launched a **mortgage rescue** scheme. The details of this are still being worked out, although many of the large lenders have agreed to the scheme in principle. However, it is expected that the scheme will only help 6,000 to 9,000 homeowners a year, as they must meet certain criteria in order to qualify for help.

These measures have been somewhat undermined by a recent case in the High Court. The Ministry of Justice is so concerned by the decision in **Horsham Properties Group Ltd v Clark [2008] EWHC 2327 (Ch)** that it is “urgently examining” the implications of the case.

In **Horsham**, the mortgagors took out a mortgage with GMAC. As with any legal mortgage, the lender had a statutory power of sale, implied into the mortgage agreement, under s.101 LPA 1925. The mortgage agreement also contained provisions which specified that if the borrowers were more than one month in arrears with their mortgage payments, the lender could sell the property or appoint a receiver of the property.

The mortgagors fell behind with their repayments, and GMAC appointed receivers of the property, who sold it to Coastal Enterprises Ltd, who in turn transferred it to Horsham Properties. During this time, the mortgagors remained in possession of the property. Once Horsham owned the property, they began possession proceedings to remove the mortgagors, on the grounds that by purchasing the property, they had overridden the rights of the mortgagors, and consequently, that the mortgagors were now trespassers.

A mortgagee does not have to seek a court order before it takes possession of a mortgaged property (*Ropaigelach v Barclays Bank* [2001] 1 QB 263). In practice, however,

the mortgagee usually does apply for a court order, if only because it then avoids any possibility of falling foul of the criminal law when it takes possession of the premises.

When a mortgagee does apply to the court for an order of possession in respect of a mortgaged property, the court has a right under s.36 of the Administration of Justice Act 1970 to postpone the possession proceedings if it appears that the mortgagor will be able within a reasonable period to pay any sums due under the mortgage.

The problem for the mortgagors in *Horsham Properties* was that the application for possession was not made by the mortgagee, but by the purchaser of the property, and under these circumstances, s.36 is not engaged. The court has no discretion to postpone possession. The mortgagors claimed that this was incompatible with the Human Rights Act 1998, and could only be compatible if s.36 was construed to extend to applications for possession made by a purchaser, as well as a mortgagee.

Briggs J rejected both arguments. The exercise of a statutory power of sale under s.101 LPA 1925 was not incompatible with the HRA 1998, and s.36 could not be triggered in the context of a claim by the purchaser.

This decision provides a very interesting loophole for lenders. By selling the property without first taking possession of it, as the lender is entirely entitled to do, the lender avoids triggering the discretion of the court under s.36. The result of this for the mortgagor is that he or she will be unable to persuade the court to allow more time for him or her to pay the arrears, and postpone possession. The consequences of this may indeed be very significant in the current economic climate.