

Shelter's response to the Ministry of Justice Consultation Power of Sale and Residential Property

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Shelter

Shelter is a national campaigning charity that provides practical advice, support and innovative services to over 170,000 homeless or badly housed people a year. This work gives us direct experience of the various problems caused by the shortage of affordable housing across all tenures. Our services include:

- A national network of over 20 advice centres
- Shelter's free advice helpline which runs from 8am-8pm
- Shelter's website which provides advice online
- The Government-funded National Homelessness Advice Service, which provides specialist housing advice, training, consultancy, referral and information to other voluntary agencies, such as Citizens Advice Bureaux and members of Advice UK, which are approached by people seeking housing advice
- A number of specialist services promoting innovative solutions to particular homelessness and housing problems. These include Housing Support Services which work with formerly homeless families, and the Shelter Inclusion Project, which works with families, couples and single people who are alleged to have been involved in anti-social behaviour. The aim of these services is to sustain tenancies and ensure people live successfully in the community
- We also campaign for new laws and policies - as well as more investment - to improve the lives of homeless and badly housed people, now and in the future

Summary

The law surrounding residential mortgages is due for reform. Rooted in the common law of the 18-19th Century, both statutory powers and mortgage contracts are heavily weighted in favour of the lender.

The power of sale without court order – albeit rarely used in respect of owner-occupied property – deprives the borrower of the right to have their case heard at court and to put forward proposals for payment of arrears which may enable them to preserve their home.

We welcome this consultation, which proposes to restrict lenders' power of sale without prior agreement or use of a court order.

Introductory comments

It was not widely appreciated that lenders had the right to sell the property over the borrower's head until the decision of the High Court in the case of *Horsham Properties v Clark and Beech*.¹ In that case, the lender exercised its power of sale with the borrower still in possession – i.e. without having first obtained a possession order. The new owner then brought proceedings to evict the borrower as a trespasser, and the court had no power to refuse this. Furthermore, it appears that the borrowers lost any claim to the equity (the balance of the sale proceeds) as a result.²

Both the Ministry of Justice (MoJ) and lender lobbies have been keen to point out that this was a buy-to-let mortgage and that Ms. Beech was in breach of the terms by occupying the property herself. But this factor was not a consideration in Mr. Justice Briggs' judgment,³ and in the present state of the law there is no doubt that the same principle would apply were this not a buy-to-let mortgage.

This principle must be addressed. Whilst lenders have made positive voluntary commitments not to use the power of sale without consent in respect of owner-occupied mortgages,⁴ there is little sense in maintaining a law which effectively permits lenders to choose whether or not to take possession proceedings via the courts. There is a real danger that unscrupulous lenders could resort to this remedy in order to circumvent court costs and processes. We believe this is an affront to justice and to the Article 8 European Convention of Human Rights (ECHR) rights of the borrower, as well to the prevention of homelessness agenda. Furthermore, as the consultation paper notes, the reform would be cost neutral at present.

¹ [2008] EWHC 2327 (Ch)

² Mr Justice Briggs said: "...the equity of redemption is overridden once the mortgagee contracts to sell the mortgaged property in exercise of the statutory power of sale... In the present case Miss Beech's share in the equity of redemption was lost when the receivers contracted to sell..." (ibid. para 22)

³ Ibid.

⁴ <http://www.cml.org.uk/cml/policy/issues/4707>

1. Do you think that legislative change is needed in relation to the exercise of the power of sale by lenders in the residential owner-occupier context?

We believe that legislative change is needed. Whilst there is little evidence of the power of sale being abused at present, we do believe that the Horsham case exposed a legal loophole that must be closed to ensure a fair and modern legal framework that effectively protects consumers.

This change could be made by way of a self-contained amendment to the Law of Property Act 1925, but we believe it should take place in the context of a wider and more holistic reform of mortgage law.

2. Do you agree that a lender's power of sale in relation to a residential owner-occupied mortgage should only be exercisable by agreement of the borrower or by order of the court?

We agree that lenders should only be able to exercise the power of sale where the borrower has had the opportunity to seek relief at court, or has given full and informed permission for the power to be exercised independent of the court process. We do not see that this restriction would in any way unfairly inhibit lenders' security – it would simply ensure that the realisation of their security was subject to judicial discretion.

If the power of sale is exercised in the absence of supervision by the court, owner-occupiers risk losing not only their home, but also their equity of redemption and their right to require the lender to obtain the best sale price reasonably obtainable. Lenders may, under widely used contractual terms, exercise the power as soon as a payment is missed. These outcomes are wholly out of place in relation to residential mortgages in the 21st century.

A state of affairs in which the lender can choose whether or not to bring possession proceedings is almost certainly incompatible with the borrower's rights under Article 8 and Article 1 of the First Protocol to the ECHR.

For these reasons it is essential that the remedy is not used without a court order or borrower agreement.

3. Do you consider that this reform should only apply to new mortgages created after the legislation comes into force?

No. This reform should apply to existing mortgages as well as future mortgages. Only applying the reform to new mortgages would mean that existing borrowers are at risk of losing their homes without proper recourse to the courts.

Given that lenders claim not to exercise the power of sale in these circumstances it is difficult to understand what sensible objection there can be to applying the reform to existing mortgages. Secondly, in a market in which the terms of the contract are entirely dictated by lenders, there is no question in our view that any arguments as to retrospective effect are outweighed by the proportionality of interposing a role for the courts on the same basis as already happens in possession proceedings.

4. Do you agree that, in the absence of an agreement, the exercise of power of sale should only be considered authorised where a possession order has been obtained, or the court makes an order permitting the sale?

We agree. This may cause some limited delay to lenders seeking to exercise the power (which in any case lenders currently accept as a matter of practice), but would ensure that:

- The borrower would have recourse to the courts and would be able to put forward proposals for payment which may enable them to stay in their home;
- The lender is required to make all possible attempts to communicate with the borrower and discuss alternative measures before exercising the power.

5. Do you agree that such an order for sale should be subject to provisions equivalent to those in section 36 of the Administration of Justice Act 1970 as amended?

We agree that, whether the lender is applying for an order for possession or an order for sale, the court should have the same powers in relation to adjourning the claim, staying or suspending execution of the judgment, or postponing the date for delivery of possession. The court does not at present have this extended discretion when making orders for sale. The provisions cannot of course be identical, as the section 36 powers are couched in the language of taking possession. In practice, we believe that lenders will almost always seek an order for possession rather than an order for sale because they will wish to obtain vacant possession before placing the property on the market.

6. In relation to abandoned properties as defined above, do you agree that the power of sale should only be exercised where a court order has been obtained because the borrower cannot be found and so cannot enter into an agreement?

We agree. It may be the case that a lender believes the property to be abandoned, but the owner is away or unavailable, or the property is in a very poor state of repair. This might be the case with properties belonging to borrowers who are very heavily indebted, or have failed to maintain their homes in good repair, for example, because of vulnerability or ill health.

Examples of case law from landlord and tenant law show the difficulties in inferring abandonment from apparent departure.⁵

Obtaining the approval of the court would clarify the position beyond doubt and put an end to the potential claims of the borrower.

7. How many cases have consultees encountered where a property is abandoned and the borrower cannot be contacted? How many of these have resulted in an unopposed retaking of peaceable possession and a sale?

We do not have sufficient evidence to answer this question.

8. Do you agree with the definition proposed of residential owner-occupied mortgages?

While we accept that the borrower's purpose in entering into a buy-to-let mortgage is commercial, and that securing business debts on the home is different from using mortgage finance to buy or improve the property, what the discussion about 'residential mortgages' misses is that someone is occupying the property as his or her home. In the case of a buy-to-let mortgage, there will normally be a lawful tenant in occupation. In the case of business debt, why should the borrower not be given the chance of saving their home that resort to court proceedings would offer? And in both cases, why should the borrower be deprived of the equity of redemption?

In almost all cases, there are alternatives to the power of sale which would minimise the cost to the lender and ultimately to the borrower. The obvious alternative measure in the context of buy-to-let is the appointment of a receiver, who can apply the rents payable by the tenant to the maintenance of the property and the mortgage debt, while at the same time honouring the terms of the tenancy. The tenant is of course an innocent party in these matters.

As the consultation paper acknowledges (para 82), the terms on which the power of sale is exercisable are set exclusively by the lender, with the assistance of statute. In our view, legislation should promote courses of action which seek as far as possible to reduce the imbalance which exists between the rights of the lender, which still heavily predominate, and the position of the occupier, as borrower or tenant, both as consumer and under human rights legislation.

⁵ See, for example, *Preston Borough Council v Fairclough* (1983) 8 HLR, CA (tenants left owing rent and having left another person in occupation: held, insufficient to infer a surrender of tenancy) and *R v Croydon London Borough Council ex parte Toth* (1988) 20 HLR 576, CA (all furniture removed, premises left empty for several weeks, and substantial rent arrears: held, surrender made out).

9. Do you think there is an existing defined category of residential mortgages that could be used to define the scope of these proposals?

The recent HM Treasury consultation paper 'Mortgage Regulation: A Consultation', proposes a new definition of a regulated mortgage contract. We consider that a straightforward way of defining residential mortgages would be to replicate this definition.

10. Do you consider that the definition should include homes bought by a person for the occupation of family members?

We agree. Although the numbers affected here will be very small, there is by definition no question of a commercial relationship between owner and occupier, and no reason why the basic protections of a possession order should not apply.

11. Do you agree that in cases where there is more than one loan over a property, the proposals should apply to each loan separately, with each assessed according to its own purpose?

We agree – borrowers should be entitled to protection regardless of whether the loan is a first or second charge loan, on the basis that each is assessed independently according to its purpose.

12. Do you agree with the initial impact assessment?

No comments.

Conclusion

Finally, we would strongly endorse the observations in para 81 of the consultation paper, that as a matter of human rights and of principle, a step so serious as the enforced sale of a mortgaged owner-occupied home should be subject to the consent of the court, and that the court should have a discretion to determine whether this is a necessary and proportionate response. We cannot see that this should be seriously in dispute. We would also support the view expressed in paragraph 82, that statute should set a meaningful minimum level of protection rather than a default protection which can be excluded by any provision to the contrary.

We do not accept the argument that this would add greatly to the costs on lenders or to the costs of borrowing. Claiming for possession in mortgage cases has been greatly streamlined.⁶ Allowing for the high charging rates of some solicitors instructed by lenders and the lack of effective control by the courts over costs in mortgage cases (another matter in need of reform), we suggest that the

⁶ By Part 55 of the Civil Procedure Rules, Practice Direction PD 55 para 2, and by the provision of a standard form court form N120.

proposition that a possession order would add appreciably to lenders' costs needs to be proved rather than merely stated.

We commend the consultation paper for its summary of the issues, not only in relation to the particular issue of the power of sale, but concerning the general structure of the law of mortgages and the limited powers of intervention which the court has (other than under the Consumer Credit Act), even where section 36 of the Administration of Justice Act applies.

We renew our argument for the pressing need for a fundamental review of the law of mortgages.

Shelter Policy Team

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For further information please contact Nicola Hughes, Policy Officer, on 0344 515 2055 or at nicola_hughes@shelter.org.uk