



Time orders in mortgage possession claims

In this month's Spotlight we will aim to provide an overview of how the time order provisions in the Consumer Credit Act (CCA) 1974 apply to mortgage possession claims. No longer for CCA regulated agreements only, time orders provide the courts with a wide discretion to allow borrowers to remain in their homes when facing possession action under any FCA regulated mortgage contract (RMC)¹.

Powers of the court to suspend possession

The powers most often used by the courts to suspend possession are contained in the Administration of Justice Acts (AJA) 1970 & 1973². These sections combined allow the court to suspend possession if the borrower can repay the arrears, plus any amounts that have fallen due in the meantime, within a 'reasonable period'. Historically, the courts were reluctant to view anything more than 3 or 4 years as reasonable, but in 1995 the Court of Appeal held that the starting point for determining the reasonable period is the remaining term of the loan. All money advisers will be familiar with the judgment in *Cheltenham & Gloucester v Norgan*³, and aware of the benefits of allowing borrowers to repay lower amounts over longer periods.

The provisions of the AJAs have some significant drawbacks. They are of very limited use to borrowers who have reached the end of their term with an outstanding balance, or who did not have an instalment loan to begin with. Despite very

encouraging obiter from the Court of Appeal in *Zinda v Bank of Scotland*⁴ (paras 20-24), the courts can also be reluctant to suspend possession where the borrower cannot make the next contractual payment and seeks to 'catch up' at a later stage. In *Zinda*, the court considered what it referred to as 'the jurisdictional hurdle' in the AJAs. It concluded that as long as the borrower's proposal would pay off the arrears and any amounts becoming due in the meantime by the end of the reasonable period, the test for making a suspended order would be met.

A time order provides greater flexibility in dealing with the mortgage balance. There is no reference to a reasonable period, and a longer period with no payments may be acceptable to the court as long as there is a realistic proposal to settle the debt. The court can vary the rate of interest and/or the term of the loan if it is just to do so.

The regulatory background

The time order provisions in s.129 of the CCA 74 apply to unsecured regulated agreements as well as mortgages, and when originally introduced, applied to CCA regulated credit agreements only. This changed on 1 April 2014, when new regulations⁶ brought RMCs under Part 9 of the CCA 74 by amending s.126⁶.

The new s.126(2) provides that RMCs, which were exempt from CCA regulation due to 'the nature of the agreement'⁷, are to be treated as though they are CCA regulated for the purpose of part 9. Part 9 is the section on judicial control and includes the time order provisions. From the point the new regulations came into force, time orders were available for CCA regulated credit agreements and RMCs regardless of the date they were executed.

The timeline

- 31 July 1974 - Consumer Credit Act regulation of certain mortgages, including some first mortgages
- 31 October 2004 – First mortgages become subject to FCA regulation (RMCs) and exempt from CCA regulation
- 1 April 2014 – RMCs subject to Part 9 CCA 74
- 21 March 2016 – Mortgage Credit Directive (MCD) Order 2015 comes into force, making CCA regulated second mortgages RMCs

Mortgages which were CCA regulated at the point of execution are now RMCs⁸. Loans that were CCA regulated when they were executed are often referred to as 'CCA back book agreements'. Certain requirements of the CCA 74 apply to agreements that started out as CCA regulated credit agreements and have since

become RMCs. Most notably, where the lender breached a duty to serve statements and notices under s77A and s86B-E CCA prior to the MCD coming into force, this breach must be remedied before the agreement is enforced⁹.

For time order purposes, there is no distinction drawn between CCA back book agreements that became RMCs and loans that started out as RMCs. Agreements that were exempt from CCA regulation for some other reason are not brought into part 9 and a time order will not be available. This will most likely be where the amount of credit exceeded the financial threshold at the time.

Particular attention should be paid to first mortgages that were executed prior to 31 October 2004 and which were not CCA regulated. These loans are not RMCs, and so not brought under part 9. If there has been a refinance of the loan since that time, the new loan is an RMC.

The trigger points

For CCA regulated credit agreements, a time order is available at the point that the creditor¹⁰:

- applies for an enforcement order, or
- serves a default notice or termination notice on the debtor, or
- gives an arrears notice to the debtor, or
- takes court action to enforce the agreement

There is normally no requirement for service of default or arrears notices for RMCs. The trigger point for a time order to be considered in respect of an RMC will almost always be in response to a possession claim by the lender. This does have advantages, namely that:

- the court can deal with the whole balance due under the agreement
- it avoids a costly and complex claim process

The other triggers still apply to time orders for CCA regulated credit agreements. Where the claim is made on the back of statutory notices of sums in arrears, the court is only able to deal with the arrears and not the outstanding balance of the loan (other than for hire purchase agreements, where the balance can be rescheduled pursuant to s.130(2) CCA 74).

The procedure

The CCA 74 is slightly misleading in parts, as it refers to 'an application', when in fact a claim is required. This is because the Act was in force before the Civil Procedure Rules (CPR), which rendered 'originating applications' obsolete and replaced them with claims. The CPR contains a specific Practice Direction for CCA related claims, but these are not applicable to actions for the recovery of land¹¹. A claim for a time order would be made under part 8 CPR. However, when responding to a claim by a lender, the matter has already been issued under part 55 (possession claims) and it will remain under that part unless the court orders otherwise.

A borrower who wishes to ask for a time order following a possession claim should complete the N11M and return it to the court within 14 days of service of the claim form. Question 6 asks 'do you intend to apply to the court for an order changing the terms of your loan agreement (a time order)?' Although this question is qualified by a statement that that it should only be answered if the loan is CCA regulated, the borrower should still tick 'yes'. The CCA at s.126 states that for the purpose of judicial control, an RMC is to be treated as though it were a CCA regulated agreement. You'll have room to expand on this point in the fully pleaded defence and counterclaim.

Pleading the case

When referring to legislation, regulations or caselaw remember to provide a full reference or citation. You'll find these in the footnotes below.

The N11M alone is unlikely to convince the court to make a time order. It's possible the District Judge hearing the case may not be aware that time orders are available for RMCs, so clearly setting out the power to make the order is the first matter to attend to. The defence can refer to the FCA's Perimeter Guidance Manual (PERG) at 4.17.2G, which confirms the position as stated and should provide sufficient authority.

You'll have help your client to submit the defence in the proper form, with the County Court hearing centre location, claim number, date, and parties. It should be headed 'additional defence and counterclaim'. Go through the particulars of claim and state - in order - which are admitted, and which are denied. If your client isn't sure say 'neither admitted nor denied'. You can then move on to explaining, in numbered paragraphs, the power of the court to make a time order.

The defence should also refer to the six-point test in the leading case on time orders, *Southern & District Finance v Barnes*¹². In *Barnes*, the Court of Appeal considered the court's powers as follows:

- the court must first consider whether it is just to make a time order
- a time order should normally be for a set period to deal with temporary financial difficulty
- the court should consider what instalments would be reasonable, having regard to the borrower's means
- the court may amend the original agreement in consequence of the order
- when dealing with 'sums due' under the agreement, the court should consider the consequences for the term and the rate of interest
- the court should suspend possession as long as the terms of the time order are maintained by the borrower

The witness statement

The SDAS 'Dealing with judgment debts' resource has a template witness statement you can use. The resource and webinar are available on the IMA Networking and Information Sharing site¹³.

The borrower must file a witness statement in addition to the defence. The witness statement should include all the relevant facts for the court to make a decision based on the strength of the case. CPR Practice Direction 32 has rules for the form and content of a witness statement.

The witness statement should contain the circumstances to be considered, in the client's own words, and in chronological order. Attach evidence where possible, and refer to it in the witness statement. For example, if the client is receiving disability benefits, attach a copy of the award letter as an exhibit. The function of the witness statement is largely to persuade the court it would be just to make a time order, so make sure it contains as much relevant information as possible.

The witness statement should contain details of:

- the circumstances in which the loan was taken out
- what financial or other difficulties the household has faced
- health problems or other vulnerability in the household
- what the borrower has done to resolve the situation
- any unfair or unreasonable conduct by the lender
- the lack of alternative housing options if the household were to become homeless
- any future improvements in financial prospects

Future improvements in prospects can be taken into account if they are reasonable and not simply hope or speculation¹⁴.

The witness evidence should also include a financial statement to demonstrate the ability to pay the amount proposed.

The proposal

Time orders allow the court to amend the agreement in consequence of the order¹⁵. This provides a power to reschedule the balance of the loan and interfere with the interest rates. A time order that reduces payments for 2 years but does not amend the interest will result in higher repayments once the order expires. The interest rate can be reduced to nil for the period of the time order, or it may be that the client's budget can stretch to paying a proportion of the interest. It's up to the lender to provide the necessary calculations to the court.

If there is a large outstanding balance, for example because the loan was interest only and has reached the end of the term, the borrower should consider whether they simply wish to continue paying interest on an ongoing basis. A time order which deprives the lender of any interest whilst there is an outstanding balance is unlikely to be acceptable.

Consider whether a stepped order is an option. This could reduce payments significantly for a shorter period, then reschedule the remaining loan on the basis of higher payments.

Costs

Mortgage possession claims are subject to indemnity costs. This means that the borrower will pay the lender's costs unless the court orders otherwise. The court will normally only forbid the lender to add the costs to the balance of the loan if it was unreasonable to issue the claim¹⁶. If the costs are unreasonable in amount, the borrower could ask the court for a summary assessment under CPR 44.3, but should be aware that if the costs are not reduced, they will have to pay any additional costs that have arisen as a result.

Clients who are requesting a time order will need a full specialist casework service and, ideally, representation at court.

Footnotes

1. For definition see art. 62(3) Financial Services and Markets (Regulated Activities) Order SI 2001/544
2. s.36 & s.8 respectively
3. [1995] EWCA Civ 11
4. [2011] EWCA Civ 706
5. The Financial Services and Markets Act 2000 (Consumer Credit) (Miscellaneous Provisions) (No.2) Order 2014 SI 2014/506 arts. 1(2), 5(4)
6. Certain pledge and green deal loans are exempt from the time order provisions: see The Financial Services and Markets Act 2000 (Regulated Activities) (Green Deal) (Amendment) Order 2014 (S.I. 2014/1850), arts. 1(2), **12(2)** (with art. 1(3))
7. Art. 60C(2) Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 SI 2001/544
8. r.29 Mortgage Credit Directive Order 2015
9. See SDAS webinar and resource 'CCA post contractual requirements'
10. s.129(1) CCA 74
11. CPR PD 7B 3.2
12. Southern & District Finance Plc v Barnes and another; J&J Securities Ltd v Ewart and another; Equity Home Loans v Lewis 27 HLR 691, CA, The Times, 19 April 1995
13. This section of the IMA website is available to non-members upon subscription
14. First National Bank v Syed [1992] 2 All ER 250
15. s.136 CCA 74
16. Co-operative Bank Plc v Phillips [2014] EWHC 2862 (Ch)