Common Defences to Possession Claims

Undue Influence and Human Rights

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Undue influence

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The leading cases and more recent case law

- *Royal Bank of Scotland v Etridge Plc* [2001] UKHL 44
- *Thomson v Foy* [2009] EWHC 1076
- *Ennis Property Finance Limited v Thompson* [2018] EWHC 1929

Undue influence

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The issues that typically arise

- How to prove undue influence?
  - Is there a relationship of trust and confidence?
  - Is there a transaction that calls for an explanation?

- What is necessary for a claim against a mortgagee?
- When is a bank put on enquiry? What should it do if it is?

Undue influence

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The burden of proof and the evidence needed to discharge it

- Burden rests on person alleging: discharged by actual proof or presumption
- Ultimately "actual undue influence" and "presumed undue influence" are different ways of proving the same thing: see *Thompson v Foy* [2009] EWHC 1076 at [100]
- "A person may be led but may not be driven"

Undue influence

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Is there a relationship of trust and confidence?

- Cases divided into 2 categories: irrebuttable presumption of influence or not?
  - E.g. parents in respect of children, trustees, religious advisors, solicitors, etc …
- Otherwise need to prove on facts
  - E.g. husband and wife
- More than just financial matters are relevant: *Sheikh v Malik* [2018] EWHC 973 (Ch)

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Is there a transaction that calls for question?

- Something that "cannot be readily accounted for by … ordinary motives …"
- Perhaps "immoderate and irrational"
- Ordinary guarantee or mortgage entered into by partner, not enough by itself: see Lord Nicholls in *Etridge* (at [30])
- Consider context of transaction

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What is necessary for claims against mortgagees?

- There must be undue influence
- Must be put on enquiry
- A failure to avoid constructive notice

Undue influence

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When is a mortgagee put on inquiry?

- Special categories of relationship
- Aware that surety placing implicit trust
- Difficult to explain transaction without undue influence
- Non-commercial relationship / benefit for one of the parties

Undue influence

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What should a mortgagee do when put on inquiry?

- First stage (communication with at risk party)
- Second stage (providing information)
- Third stage (actual knowledge or suspicion)
- Fourth stage (written confirmation or certificate)

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Recent cases

- *Ennis Property Finance Limited v Thompson* [2018] EWHC 1929 (Ch)
- *Holyoake v Candy* [2017] EWHC 3397 (Ch)
- *Sheikh v Malik* [2018] EWHC 973 (Ch)
- *Conte v National Westminster Bank* [2018] 1 P & CR DG1
- *Santander UK Plc v Fletcher* [2018] EWHC 2278 (Ch)

Human rights

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Are human rights grounds a good defence?

- *Southern Pacific Mortgages Limited v Green* [2015] 11 WLUK 495
- As against a private landlord, Article 8 offers no protection: *McDonald v McDonald* [2014] EWCA Civ 1049
- Same principle applies against private mortgage lender
- Upheld on appeal, but no appeal against HRA points: [2018] EWCA Civ 854

More time to pay?

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The legal framework

- Common law – only very limited power: *Birmingham Citizens v Caunt* [1962] CH 883
- Section 36 of the AJA 1970
- Section 8 of the AJA 1973
- Not apply to "all monies" charges that do not provide for deferment of an existing liability: *Habib Bank v Tailor* [1982] 1 WLR 1218 at 1225

More time to pay?

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The leading case

- *Bank of Scotland v Zinda* [2011] EWCA Civ 706
- Jurisdictional gateway must be passed
- Court then has wide discretion

More time to pay?

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Procedural points

- Must be dwelling house on date claim commences: *Royal Bank of Scotland v Miller* [2001] EWCA Civ 344
- See section 39 of AJA 1970 for definition of "dwelling house"
- Informal evidence permitted if no objection: *C&G v Grant* (1994) 26 HLR 703 cf. *Jameer v Paratus AMC* [2012] EWCA Civ 1924 and CPR 55.8(4)
- Any period of suspension must be defined or readily ascertainable: *Royal Trust Co of Canada v Markham* [1975] 3 All ER 433 (CA)
- Usual to suspend the money judgment for as long as the possession order is suspended: *Cheltenham and Gloucester Building Society v Johnson and Sunshine* (1996) 73 P & CR 293 (CA)

More time to pay?

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What is a reasonable period?

- The full term is taken as a starting point: see *Cheltenham and Gloucester Building Society v Norgan [1996] 1 All ER 449 [1996]*
- Practical summary of principles in *Norgan*
- What if the term has expired? See *LBI HF v Stanford* [2015] EWHC 3131 (Ch)

More time to pay?

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Is a person likely to be able to pay within reasonable period?

- Likelihood is a question of fact: *Royal Trust Co of Canada v Markham* [1975] 3 All ER 433 (CA)
- Not proper to make order borrowers cannot afford or if payments not enough to repay in reasonable period: *First National Bank plc v Syed* [1991] 2 All ER 250 (CA)

Unauthorised lending

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The regulatory framework

- Financial Services and Markets Act 2000
- Section 19: general prohibition
- Section 26: agreement unenforceable
- Section 28: consequences of unenforcability

Unauthorised lending

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Which mortgages are regulated agreements?

- Definition in Article 61 of the Financial Services and Markets Act 2000 (Regulated Activities Order) 2001/544
- Includes second charge loans since 20th April 2015
- Exemptions in Article 61A
  - E.g. limited payment second charge bridging loans, second charge business loans, investment property loans

Unauthorised lending

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What are the consequences of breach?

- Section 28(3) – Court may permit enforcement if just and equitable
- Must consider whether lender "believed" contravening general prohibition
- Depends on borrower's election: *Dickenson v UK Acorn Finance Limited* [2015] EWCA Civ 1194
- Section 28(7) - Borrower must repay money received
- *Fortwell Finance Limited v Halstead* [2018] EWCA Civ 676

Mortgage Law Update

Common Defences to Possession Claims

November 2018

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Introduction

1. There are a number of defences that are commonly and not so commonly encountered in mortgage possession proceedings. This talk will outline the principles applicable to the each of the following defences and discuss some recent case law:

   1.1. Undue influence;

   1.2. Human rights;

   1.3. Requests for more time; and

   1.4. Unauthorised lending.

Undue influence

2. The leading case is *Royal Bank of Scotland v Etridge plc (No. 2)* [2001] UKHL 44, [2002] AC 773; although a useful summary of the principles can be found in more recent cases, such as *Thomson v Foy* [2009] EWHC 1076 and *Ennis Property Finance Limited v Thompson* [2018] EWHC 1929 (Ch), a case decided on 25th July 2018.

3. The nine principles derived from *Etridge* by Mr Andrew Hochhauser QC in *Ennis Property Finance Limited* are used below provide some structure to the issues that fall to be considered in any given case.

The burden of proof and the evidence needed to discharge it: how to prove undue influence?

4. The first point to note is that usually a mortgagee has little or no direct knowledge of the facts said to amount to undue influence; but it is still useful to bear in mind what has to be demonstrated.

5. The first and second principles in *Ennis Property Finance* address the burden of proof:

> "(1) "Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case." [per Lord Nicholls at [13]]
>
> "(2) The burden of proof can be discharged by establishing that:
>
> (a) the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs; and
>
> (b) a transaction which calls for explanation.

This will normally be sufficient, failing satisfactory evidence to the contrary. [per Lord Nicholls at [14]]. In other words, once these two elements are made out (and both must be present), then the Court will infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. The evidential burden shifts to the other party …"

6. It is worth noting, however, that as Lord Clyde observed in *Etridge* (at [93]):

> "At the end of the day, after trial, there will either be proof of undue influence or that proof will fail and it will be found that there was no undue influence. In the former case, whatever the relationship of the parties and however the influence was exerted, there will be found to have been an actual case of undue influence. In the latter there will be none." [emphasis added]

7. There is accordingly one doctrine of undue influence that can be proved by different means.

8. Lewison J also made clear in *Thompson* (at [100]) that although the "cases (and the textbooks) speak of "presumed undue influence" and "actual undue influence" these are no more than different ways of proving the same thing. In the former case undue influence is proved with the aid of an evidential presumption. In the latter case it must be proved without any such presumption."

9. For an example of a case where actual undue influence, in the form of an alleged threat, was relied upon and failed, see *Holyoake v Candy* [2017] EWHC 3397 (Ch).

Some further observations on undue influence

10. Lewison J also highlighted the following important points in *Thompson* (at [100]):

    10.1. the critical question is whether or not the influence has invaded the free volition of the donor to withstand the influence. "The donor may be led but she must not be driven; and her will must be the offspring of her own volition, not a record of someone else's." There is no undue influence unless the donor if she were free and informed could say "This is not my wish but I must do it": *Drew v Daniel [2005] 2 FCR 365* (at [36]);

10.2. it is highly unlikely on the facts that the court would ever be justified in finding that undue influence consisted both of coercion and abuse of trust and confidence. People do not usually trust those who coerce them: Bank of Scotland v Bennett [1999] FLR 1115;

10.3. it is necessary to look at the situation at the time the impugned transaction was entered into, rather than at subsequent events, save in so far as subsequent events cast light on what was happening before and at the time of the impugned transaction.

Is there a relationship of trust and confidence?

11. The cases can be divided into two categories. A complainant can either show that the relationship falls within the special class of relationships where influence is (irrebuttably) presumed; or if a relationship does not fall within one of the special classes, evidence must be adduced to establish such a relationship.

12. Examples in the first class include: parents in respect of their children, where the parent benefits from a transaction (but not vice versa) and while the child is subject to parental "dominion"; trustees; religious advisors; and solicitors.

13. The relationship of husband and wife is not one that gives rise to a presumption of influence, nor is the relationship of customer and banker. As Lord Nicholls stated in *Etridge* (at [20]):

> "there is nothing unusual or strange in a wife, from motives of affection or for other reasons, conferring substantial financial benefits on her husband. Although there is no presumption, the court will nevertheless note, as a matter of fact, the opportunities for abuse which flow from a wife's confidence in her husband. The court will take this into account with all the other evidence in the case. Where there is evidence that a husband has taken unfair advantage of his influence over his wife, or her confidence in him, 'it is not difficult for the wife to establish her title to relief: see In re Lloyds Bank Ltd, Bomze v Bomze [1931] 1 Ch 289, at p 302, per Maugham J."

14. But consideration of the question of whether or not there is a relationship of trust and confidence is not be limited to financial affairs and should include the nature of the transaction and factors that may increase vulnerability, such as age, infirmity, immobility and lack of English.

15. In the recent case of *Sheikh v Malik* [2018] EWHC 973 (Ch) at [44] to [52] it was held that:

> "A transaction that is seriously and inexplicably detrimental to the disponor is plainly likely to lead to a conclusion that it can only have been the result of a relationship of trust and confidence … there is a connection between the two separate factual assessments … such that the more disadvantageous and inexplicable the transaction the more easily a relationship of influence will be established to exist." [emphasis added]

16. *Malik* was a successful appeal against a decision of the First Tier Tribunal where the Judge below had limited the inquiry to whether or not there was a relationship of trust and confidence in relation to financial matters, but did not attach sufficient weight to the nature of the transaction or the appellants' advancing age or physical infirmity.

17. Equally, in *Thomson*, Lewison J confirmed that "although in Etridge Lord Nicholls of Birkenhead described the paradigm case of a relationship where influence is presumed as being one in which the complainant reposed trust and confidence in the other party in relation to the management of the complainant's *financial* affairs (§ 14), that description was not intended to be exhaustive".

Is there a transaction that calls for explanation?

18. The mere existence of influence is not enough, the transaction should be "immoderate and irrational" in the words of *Lord Macnaughten in Bank of Montreal v Stuart [1911] AC 120, 137* or at least out of the ordinary.

19. As Lord Nicholls said in *Etridge* (at [30]):

> "I do not think that, in the ordinary course, a guarantee of the character I have mentioned is to be regarded as a transaction which, failing proof to the contrary,

is explicable only on the basis that it has been procured by the exercise of undue influence by the husband. Wives frequently enter into such transactions. There are good and sufficient reasons why they are willing to do so, despite the risks involved for them and their families. They may be enthusiastic. They may not. They may be less optimistic than their husbands about the prospects of the husbands' businesses. They may be anxious, perhaps exceedingly so. But this is a far cry from saying that such transactions as a class are to be regarded as prima facie evidence of the exercise of undue influence by husbands." [emphasis added]

20. What is needed is a transaction that "cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship" (per Lord Nicholls at [24]), which is highly dependent on the facts of the case.

21. In the case of a mortgage provided by way of security, it is necessary to consider the terms of the guarantee or mortgage.

22. The transaction must be looked at in its context and to see what its general nature was and what is was trying to achieve for the parties (*per* Lewison J in *Thompson* at [100]).

23. *Ennis Property Finance* was a case where a wife failed to establish that her husband had exerted undue influence over her in respect of various guarantees she provided over company loan facilities. A relationship of trust and confidence was found on the facts, but the transactions in question did not fall outside "the ordinary course" that required an explanation (at [263]). Furthermore, the Judge did not regard Mr Thompson as behaving in any way improperly or unconscionably towards his wife (at [262]). The fact that Mrs Thompson may have deferred to her husband's judgment did not constitute undue influence (at [262]).

What is necessary for a claim to be established against a third party?

24. In his fifth principle, Mr Andrew Hochhauser QC explained that, it is necessary for a complainant to establish that:

    24.1. There has been undue influence;

24.2. The mortgagee was put on inquiry or had actual notice of the undue influence; and

24.3. If so, the mortgagee failed to avoid constructive notice of the undue influence.

25. If undue influence is not established, either actually or by means of an unrebutted presumption, it is not necessary to consider the second and third limbs. As mentioned above, the first limb, however, is often something that a mortgagee has no direct evidence of either way, so its focus tends to be on the second and third limbs.

What is the significance of taking legal advice?

26. As explained by Lewison J in *Thompson* (at [99]):

> "x) Proof that the donor received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all the circumstances. In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a donor a proper understanding of what he or she is about to do. But a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case (§ 20);
>
> xi) The nature of the advice required is that someone free from the taint of undue influence should put before the donor the nature and consequences of the proposed transaction. It is not necessary for the adviser to recommend the transaction. An adult of competent mind is entitled to enter into a financially unwise transaction if he or she wants to (§§ 60 and 61)." [emphasis added]

27. A good example of the emancipating effect of legal advice can be found in *Re Brindley* [2018] EWHC 157 (Ch), in which an 83-year old had gifted her home to her son by making him a beneficial joint tenant. The transfer was not void for undue influence, even though he had failed to discharge his obligation of candour and fairness by not explaining that the transfer would deprive her other son of any interest. The Court was satisfied that his mother entered into the transaction with "full, free and informed thought" as a result of the legal advice being provided.

28. *Re Brindley* involved a lifetime transfer but be careful when reading cases involving allegations of undue influence made in respect of wills as a different test applies.

When is a mortgagee put on inquiry?

29. A mortgagee can be fixed with notice as a result of an agency relationship; although, usually at least, a mortgagee does not seek the consent of a surety through the principal debtor and the principal debtor will not be treated as the mortgagee's agent.

30. The more common route by which a financial institution is fixed with constructive notice of undue influence is when it is put on inquiry by one or more features of the relationship between the principal debtor and the surety, such as (see Snell's Equity (33rd ed.) at 37-027):

    30.1. If there is a relationship that falls within one of the special categories where influence is irrebutably presumed;

    30.2. If it is aware that the surety is accustomed to placing implicit trust in the principal debtor;

    30.3. If the transaction is difficult to explain in the absence of undue influence; or

    30.4. Where the relationship between the principal debtor and the surety is non-commercial.

31. The bank is not put on inquiry where the loan is made jointly to a husband and wife, unless the bank is aware the loan is being made for the purposes of one or other of the applicants: see the decision of the House of Lords in *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200 (a case in

which Nigel Clayton appeared as junior counsel). A normal joint loan for the benefit of both applicants should not excite suspicion; but the threshold for notice generally is otherwise very low.

32. In *Mahon v FBN Bank (UK) Ltd* [2011] EWHC 1432 (Ch), the general approach was summarised as follows (at [51]):

32.1. (1) where the loan is to or for the benefit of the husband or his business, as distinct from a joint loan to or for the benefit of both the husband and the wife, the bank is "put on inquiry". That is so even where the wife is a shareholder and/or an officer (director or secretary);

32.2. (2) where the wife's interest and/or involvement is substantive rather than titular, if she is an active participant in managing the company's affairs and is rewarded by remuneration for her work and/or dividends or interest for her investment, the loan may well be equated with a joint loan (although see below);

32.3. but (3) where the financial arrangements with the bank are negotiated by the husband and the wife plays no part in those negotiations but is asked to become surety for the debts of her husband or the business, the bank should be aware of the vulnerability of the wife and of the risk that her agreement might be procured by undue influence or misrepresentation on the part of the husband, and is "put on inquiry" .

33. If one party becomes a surety for a company that both parties are shareholders in, the mortgagee is put on inquiry even if the shareholdings are equal (*Etridge* at [49]):

> "The shareholding interests, and the identity of the directors, are not a reliable guide to the identity of the persons who actually have the conduct of the company's business".

34. A bank is not necessarily excused from enquiries where a wife is a business partner: see *O'Neill v Ulster Bank Ltd* [2015] NICA 64 at [17].

35. A recent example of a case where a bank was not put on inquiry is *Conte v National Westminster Bank* [2018] 1 P & CR DG1, which was an attempt to remove a legal charge in the First Tier Tribunal (Property Chamber).

What should a bank do when it is put on inquiry?

36. The steps that should be taken are set out in detail in [79] of Lord Nicholl's speech in *Etridge*:

The first stage (communication with at risk party and choosing a solicitor to advise)

36.1. the mortgagee should take steps to check directly with the proposed surety the name of the solicitor he or she wishes to act for on their behalf;

36.2. the mortgagee should communicate directly with the proposed surety;

36.3. the mortgagee should inform the surety that for its own protection it will require written confirmation from a solicitor, acting for him or her, to the effect that the solicitor has fully explained the nature of the documents and the practical implications they will have;

36.4. he or she should be told that the purpose of this requirement is that thereafter the surety should not be able to dispute she is legally bound by the documents once she has signed them;

36.5. the surety should be asked to nominate a solicitor whom she is willing to instruct to provide advice, separately from their partner, and act for the surety in giving the necessary confirmation to the bank;

36.6. the surety should be told that, if the surety wishes, the solicitor may be the same solicitor as is acting for his or her partner in the transaction;

36.7. the mortgagee should not proceed with the transaction until it has received an appropriate response directly from the proposed surety;

The second stage (provision of information to the solicitor)

36.8. the mortgagee should provide the solicitor with the financial information necessary to properly advise the proposed surety. What is required will depend on the facts of the case, but ordinarily, will include information on the purpose for which the proposed new facility has been requested, the current amount of their partner's indebtedness, the amount of the current overdraft facility, and the amount and terms of any new facility;

36.9. if a written application has been made that resulted in the request for security, a copy of that application should be sent to the solicitor (with the applicant's consent);

The third stage (where the bank has actual knowledge or suspicion)

36.10. Exceptionally, the mortgagee may believe or suspect that the proposed surety has been misled and is not entering the transaction of his or her own free will. If so, the bank must inform the solicitor of the facts giving rise to the belief or suspicion;

The fourth stage (written confirmation or certificate from solicitor)

36.11. The mortgagee should always obtain written confirmation from the proposed surety's solicitor that he or she has been advised in the manner set out above.

37. Where a solicitor also acts for a bank as well as a surety, the solicitor must consider whether or not there is any conflict of interest before and while acting; although any knowledge he acquires within the scope of his duty of advising the surety is not attributable to the bank: see *Halifax Mortgage Services Ltd v Stepsky* [1995] 2 WLR 301.

38. It is not as simple as obtaining a certificate of legal advice, the fourth stage. The amount of weight that the certificate carries depends on the extent to which the three earlier stages have been complied with.

Other issues

39. Laches, acquiescence and delay can be relevant after the source of the influence has been removed.

40. The principle "restitutio in integrum" (or putting the parties back in the position they would otherwise have been in) also applies; but the practical outcome differs between debtor-creditor and debtor-creditor-surety transactions. In the former, the Court will set aside the transaction on terms that neither party is unduly enriched, in the latter the surety will not normally have received any benefit from the transaction (see Snell's Equity (33rd ed.) at 37-029).

41. In *Santander UK Plc v Fletcher* [2018] EWHC 2278 (Ch), it was confirmed that where a legal charge is over a jointly held property and it is set aside for undue influence on the application of one of those parties, the bank may still have an equitable charge over the beneficial interest of the other party. This is the same principle that applies in other cases of fraud, such as in *First National Bank v Achampong* [2003] EWCA Civ 487 and *Edwards v Lloyds TSB* [2004] EWHC 1745 (Ch).

The relevance of the Human Rights Act?

42. In *Southern Pacific Mortgage Limited v Green* [2015] 11 WLUK 495 (at [44]) Recorder Rowlands held:

> "I can deal with this aspect of the case quite briefly. There are significant obstacles standing in the way of the Defendant succeeding in relying on the European Convention on Human Rights as a defence to this claim. The most significant of them is the decision of the Court of Appeal in *McDonald v McDonald [2014] EWCA Civ 1049*. In that case, the Court held that, as against a private landlord, article 8 offered no protection. The fact that the Court was a public authority did not assist. The same would, in my view, apply to a mortgage lender. The mortgage lender is not a public authority."

43. The above authority was recently upheld on appeal in [2018] EWCA Civ 854, although the Human Rights Act point was not pursued anyway.

Requests for more time to pay

44. At common law, the rule was, and remains, that once the mortgagee has become entitled to take possession the Court has only a very limited power to grant the mortgagor any relief. As Russel J said in *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883:

> "… where (as here) the legal mortgagee under an instalment mortgage under which by reason of default the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. To this the sole exception is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring." [emphasis added]

45. Against this background, Parliament intervened by enacting section 36 of the Administration of Justice Act 1970, which states:

> (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." [emphasis added]

46. The section is potentially engaged where there is a claim for possession of land that consists of or includes a dwelling-house and the mortgagor is able to repay "any sums due" within a reasonable period.

47. The difficulty created by the wording of the section, however, was that if a mortgage contained an acceleration clause upon default, the entire balance fell to be considered under "any sums due": see *Halifax Building Society v Clark* [1973] Ch 307.

48. In order to address this practice, Parliament intervened again to enact section 8 of the Administration of Justice Act 1973, which states:

"(1) Where by a mortgage of land which consists of or includes a dwelling-house, or by any agreement between the mortgagee under such a mortgage and the mortgagor, the mortgagor is entitled or is to be permitted to pay the principal sum secured by instalments or otherwise to defer payment of it in whole or in part, but provision is also made for earlier payment in the event of any default by the mortgagor or of a demand by the mortgagee or otherwise, then for purposes of section 36 of the Administration of Justice Act 1970 (under which a court has power to delay giving a mortgagee possession of the mortgaged property so as to allow the mortgagor a reasonable time to pay any sums due under the mortgage) a court may treat as due under the mortgage on account of the principals sum secured and of interest on it only such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment.

(2) A court shall not exercise by virtue of subsection (1) above the powers conferred by section 36 of the Administration of Justice Act 1970 unless it

appears to the court not only that the mortgagor is likely to be able within a reasonable period to pay any amounts regarded (in accordance with subsection (1) above) as due on account of the principal sum secured, together with the interest on those amounts, but also that he is likely to be able by the end of that period to pay any further amounts that he would have expected to be required to pay by then on account of that sum and of interest on it if there had been no such provision as is referred to in subsection (1) above for earlier payment." [emphasis added]

49. In *Bank of Scotland plc v Zinda* [2011] EWCA Civ 706, it was held by Munby LJ, who gave the only substantial judgment, that the effect of these provisions is twofold (at [23]):

49.1. Firstly, there is a jurisdictional gateway created by the requirement on the mortgagor to demonstrate that he is "likely to be able to within a reasonable period" (section 36(1)) both "the amounts [he] would have expected to be required to pay if there had been no … provision for earlier payment" (section 8(1)) – i.e. the arrears to date – and "the further amounts the he would have expected to be required to pay by then" (section 8(2)) – i.e. the future instalments accruing during the reasonable period;

49.2. The power of suspension is conditional on it appearing to the Court that "in the event of the exercise of the power … the mortgagor is likely to be able to pay the sums in question in a reasonable period" (at [23]);

49.3. Secondly, if the mortgagor passes the jurisdictional hurdle, the Court is given a wide discretion under sections 36(2) and (3) to attach "such conditions with regard to payment of *any sum* secured by the mortgage" as the court thinks fit (at [24]);

49.4. The power is <u>not</u> confined to the arrears or the future instalments accruing during the reasonable period (under section 36(1)) nor is it qualified by reference to the "reasonable period".

<u>When does the property have to be a "dwelling house"?</u>

50. The relevant time for determining whether a property was a dwelling house for the purpose of section 36(1) is the date on which an action for possession commences and a breach of a restriction in the mortgage agreement (such as any restrictions on occupation) did not prevent section 36 applying: *Royal Bank of Scotland v Miller* [2001] EWCA Civ 344.

51. Section 39 contains the definition of "dwelling house" and makes clear that "the fact that part of the premises comprised in a dwelling-house is used as a shop or office or for business, trade or professional purposes shall not prevent the dwelling-house from being a dwelling-house for the purposes of this Part of this Act."

What if the principal sum has fallen due other than as a result of a default?

52. Section 8 does not apply to "all monies" charges that do not provide for deferment of an existing liability, after a written demand has been made: *Habib Bank v Tailor* [1982] 1 WLR 1218 at 1225.

53. In such a case, or if the term of the mortgage has expired, section 36 can only be relied upon if it is likely that all of the sums due under the mortgage will be repaid within a reasonable period.

What evidence can be relied upon?

54. Under CPR 55.8(4), in possession claims, all witness statements must be filed and served at least 2 days before the hearing, except in claims made against trespassers, where all the witness statements on which the claimant intends to rely must be filed and served with the claim form.

55. But it is not unusual for borrowers to bring sometimes voluminous documentation with them to possession hearings.

56. In *Cheltenham and Gloucester Building Society v Grant* (1994) 26 HLR 703 at 707, the Court of Appeal held that:

> "It is not the function of this court to lay down rigid rules as to how busy district and county court judges should satisfy themselves of what they have to be

satisfied for the purposes of sections 36 and 8 . It must be possible for them to act without evidence, especially where, as here, the mortgagor is present in court and available to be questioned and no objection to the reception of informal material is made by the mortgagee. Clearly, it will sometimes be prudent for the mortgagor to put in an affidavit before the hearing. Moreover, if the mortgagee submits that the truth of what the court is told should not be accepted without evidence, then evidence will normally be necessary. In the absence of such a submission it must be for the judge to decide whether or not to act on the basis of informal material." [emphasis added]

57. The fact that the authority relies upon no objection being made to the receipt of informal evidence from the mortgagor is sometimes overlooked.

58. In any event, a borrower who is attempting to rely on section 36 should aim to file a comprehensive witness statement, with supporting documentation, in advance. It is the quality of the documentation that often lets borrowers down. In *Jameer v Paratus AMC* [2012] EWCA Civ 1924, it was held by Lewison J (at [12]) that:

> "a borrower who asks the court to exercise a discretion in his or her favour to allow further time for payment of arrears due under a mortgage must present, frankly and fully, up-to-date information about his or her expenditure and income, such that the court can place reliance on what is being said."

What is a reasonable period?

59. In *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 All ER 449 [1996] 1 WLR 343, it was held by Waite LJ (with whom the other Judges agreed, at 353):

> "the court should take as its starting point the full term of the mortgage and pose at the outset the question: "Would it be possible for the mortgagor to maintain payment-off of the arrears by instalments over that period?""

60. A practical summary of the principles in *Norgan* was set out by Evans LJ (at 357-8):

> "… the following considerations are likely to be relevant when a "reasonable period" has to be established for the purposes of section 36 of the Act of 1970. (a)

How much can the borrower reasonably afford to pay, both now and in the future? (b) If the borrower has a temporary difficulty in meeting his obligations, how long is the difficulty likely to last? (c) What was the reason for the arrears which have accumulated? (d) How much remains of the original term? (e) What are relevant contractual terms, and what type of mortgage is it, i.e. when is the principal due to be repaid? (f) Is it a case where the court should exercise its power to disregard ***358*** accelerated payment provisions (section 8 of the Act of 1973)? (g) Is it reasonable to expect the lender, in the circumstances of the particular case, to recoup the arrears of interest (1) over the whole of the original term, or (2) within a shorter period, or even (3) within a longer period, i.e. by extending the repayment period? Is it reasonable to expect the lender to capitalise the interest or not? (h) Are there any reasons affecting the security which should influence the length of the period for payment? In the light of the answers to the above, the court can proceed to exercise its overall discretion, taking account also of any further factors which may arise in the particular case." [emphasis added]

61. Where the term of the mortgage has expired, however, a reasonable period is likely to be a fairly short one; although, see *LBI HF v Stanford* [2015] EWHC 3131 (Ch).

62. In *LBI HF* an order for possession of two properties was suspended for a second time where there was evidence that the properties could be sold shortly. The mortgage term had expired in 2012; in January 2015, the order was suspended for seven months; but the Court held that it would be reasonable to grant a further suspension to the end of the year (the case was heard in September) – for around 3 months. But it is worth noting that the property in question was valued at around £18m and that expert evidence was before the Court that it would be likely that it would be sold at that price by the end of the year.

Is a person "likely" to be able within a reasonable period to pay any sums outstanding?

63. "Likelihood" is a question of fact to be determined by the Court on the evidence before it: see *Royal Trust Co of Canada v Markham* [1975] 3 All ER 433 (CA) [1975] 1 WLR 1416 at 1422.

64. If this threshold is not met, the jurisdictional gateway conferred by section 36 is not open and the Court cannot suspend an order, other than by relying on the common law exception.

65. In *First National Bank plc v Syed* [1991] 2 All ER 250 (CA) at 255, it was held by Dillon LJ:

> ""It cannot be proper, with a view ostensibly to clearing the arrears within a reasonable period, to make an order for payments which the defendants cannot afford and have no foreseeable prospects of being able to afford within a reasonable time. Equally it cannot be proper, under these sections, to make an order for payments which the defendants can afford if those will not be enough to pay off the arrears within a reasonable period and also to cover the current instalments."

The period of any suspension

66. Any period must be defined or readily ascertainable: see *Royal Trust Co of Canada v Markham* [1975] 3 All ER 433 (CA) [1975] 1 WLR 1416.

67. It is usual to suspend the money judgment for as long as the possession order is suspended: see *Cheltenham and Gloucester Building Society v Johnson and Sunshine* (1996) 73 P & CR 293 (CA).

Can an order be subsequently set aside or varied?

68. The Court has jurisdiction to vary an order subsequently, even if the mortgagor has not defaulted and the circumstances have not changed: see *Abbey National Mortgages v Bernard* (1996) 71 P & CR 257 (CA), where the original order imperfectly recorded a draft consent order and was intended to be temporary, even though it did not state as much.

69. Nonetheless, if an application is made in such circumstances, it may amount to an abuse of process if it repeats submissions that have already been rejected by the Court.

70. Once a possession order has been executed, the Court has no jurisdiction to suspend an order unless: (a) the possession order can be set aside; (b) the warrant has been obtained by fraud; or (c) there has been an abuse of process or oppression in its execution: see *Da Rocha-Afodu v Mortgage Express* [2007] EWHC 297 at [38] to [29] applying *Cheltenham & Gloucester Building Society v Obi* (1996) 28 HRL 22.

Unauthorised lending

71. This type of defence usually arises in one of two situations: a non-regulated lender can inadvertently stray into the regulated market; or there can be deliberate, unregulated money lending. In either case, the same regulatory Acts and Regulations apply, albeit in the second scenario the chance of obtaining an enforcement order is significantly reduced.

72. The starting point is the Financial Services and Markets Act 2000 ('the 2000 Act').

The Financial Services and Markets Act 2000 ('the 2000 Act')

73. The scope of what mortgage lending is regulated is governed by the Financial Services and Markets Act 2000 and the regulations made under it.

74. The key sections of the 2000 Act to be aware of are:

74.1. Section 19, which contains a general prohibition on persons carrying on "regulated activities" in the United Kingdom unless they are authorised or exempt;

74.2. Section 22, which provides that a "regulated activity" is an activity of a "specified kind" that is in general carried on by way of business;

74.3. Section 26, which provides that:

> "(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.
>
> (2) The other party is entitled to recover–
>
> (a) any money or other property paid or transferred by him under the agreement; and
>
> (b) compensation for any loss sustained by him as a result of having parted with it." [emphasis added]

74.4. Section 27, which contains similar provisions in respect of agreements that are made through unauthorised persons, such as unauthorised mortgage brokers;

74.5. Sections 28 and 28A, which set out the consequences for agreements and "credit-related" agreements respectively if they are entered into in breach of sections 26 and 27.

75. Under section 21(1)(1B) and (1C), "credit-related regulated activities" are those designated by statutory instrument, but, under section 21(1)(D), a "regulated activity" may not be designated under sub-section (1B) "if the agreement in question is one under which the obligation of the borrower is secured on land".

Which mortgages are regulated agreements?

76. Articles 61 and 61A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544 ('the RAO') sets out which mortgages are regulated mortgages and which are exempt (i.e. it specifies kinds of activity for the purpose of section 22).

77. Since 21st March 2016 (earlier for certain purposes), a regulated mortgage contract has been defined as:

77.1. A contract under which a lender provides credit to an individual or to trustees;

77.2. In which the obligation of the borrower to repay to be secured by mortgage on land in the EEA; and

77.3. At least 40% of that land is used or is intended to be used: in the case of credit provided to an individual, as or in connection with a dwelling; or in the case of credit provided to trustees, by a beneficiary in a similar way, or by a "related person";

77.4. A contract that is not exempt under Articles 61A(1) or (2).

78. From 21st March 2016, the restriction that only first legal charges were regulated mortgage contracts was removed by the Mortgage Credit Directive Order 2015 (SI 910/2015).

79. The exemptions under Article 61A that are most commonly relied upon are for:

79.1. limited payment second charge bridging loans (under 61A(1)(b): borrower-lender-supplier agreements financing the purchase of land, used as temporary financing solution, which ranks behind one or more charges and where there are no more than 4 payments due);

79.2. second charge business loans (under 61A(1)(c): loans where more than £25,000 is provided in credit, the mortgage ranks behind one or more other charges and the agreement is entered into wholly or predominantly for the purpose of a business carried on, or intended to be carried on by the borrower); and

79.3. investment property loans (under 61A(1)(d): where, in the case of a loan to an individual borrower, less than 40% of the land subject to the mortgage is used, or intended to be used, as or in connection with a dwelling by the borrower or by a related person, such as a spouse or civil partner, or other defined relatives).

80. The extended definition of each type of exemption is found in Article 61A.

<u>The consequences of breach</u>

81. Under section 28(3), if the Court is satisfied that it is just and equitable in the circumstances of the case, it may allow (a) the agreement to be enforced or (b) the money and property paid or transferred under the agreement to be retained.

82. In considering whether or not to permit enforcement, in a section 26 case, the Court must have regard to whether or not the person carrying on the regulated activity reasonably believed he was not contravening the general prohibition by making the agreement, under section 28(5).

83. However, under section 28(7), if a person against whom the agreement is unenforceable: (a) elects not to perform the agreement or (b) as a result of section 28, recovers money paid or

other property transferred by him under the agreement, he must repay any money and return and property received by him under the agreement too. The section does not provide a windfall to borrowers.

84. In *Helden v Strathmore* [2011] EWCA Civ 542, the Court of Appeal upheld the decision of a lower court that granted permission to a lender to enforce a legal charge that was entered into in breach of the general prohibition.

85. In *Dickenson v UK Acorn Finance Limited* [2015] EWCA Civ 1194, it was confirmed that: "…unenforceability depends on the borrowers' election and is conditional on the return of any money lent. Again, there is no blanket unenforceability."

86. Issues concerning regulated activities and whether or not a lender was "administering a regulated mortgage", which is another type of specified activity under Article 61(2) of the RAO were considered in the recent case of *Fortwell Finance Limited v Halstead* [2018] EWCA Civ 676.

87. In *Fortwell Finance* there was a dispute about the extent to which the lender knew that the land was occupied by the borrower and whether or not it was more than 40% of the land, so as to make the mortgage a "regulated mortgage". Prior to the possession hearing, however, the parties entered into a consent order. The borrower sought to have the order set aside on the ground that entering into it was a regulated activity and argued that it too was unenforceable. The Court of Appeal held that a mortgage lender was not "administering a regulated mortgage" when it agrees to a consent order.

88. It is also worth noting that he appeal before the Court of Appeal was a second appeal. The initial appeal was before Picken J, who also considered the effect of a special condition entered into by the borrowers to the effect that "neither the borrower nor any family member should occupy, nor was any of them intending to occupy, the property as a dwelling". Picken J held that the borrower could not go behind the term as it created a clear estoppel, unless the creditor was aware the debtor would not be complying with it.

89. Piken J also went further and held that (at [35]) "whatever the respondent may have known as to the state of the property (or part of it) as a dwelling prior to the loan, the special condition addressed the situation prospectively and the appellants had undertaken not to use the

Property as a dwelling for the period of the loan". It may be otherwise, however, if the loan agreement was entered into as a sham to deliberately evade regulation.

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