

Civil Justice Council Consultation on Review of Pre-Action Protocols

Date: 19 January 2022

Sent to: submitted to [REDACTED]

UK Finance is the collective voice for the banking and finance industry.

Representing more than 300 firms across the industry, we act to enhance competitiveness, support customers and facilitate innovation. We represent the full range of the mortgage industry from the largest lenders to the smallest, high street and challenger banks, building societies as well as non-banks and the regulated third-party administrators who service inactive lenders. Our members include lenders who are fully intermediated and lenders who provide advice directly to customers.

General Comments

- This response is limited to the issues considered by the Housing Subcommittee regarding the possession claims for Mortgage Arrears PAP.
- This response considers the merits of the proposals relative to lenders' obligations to ensure good customer outcomes and to maintain the principle that possession remains a last resort when all options to support the customer to return to making payment on their mortgage have been exhausted.
- We are aware that the relevant panel firms who provide mortgage litigation services to our members are responding to the technical detail. We will defer to these responses for the specifics.
- We consider that the PAP, coupled with the Financial Conduct Authority's (FCA) Mortgage Conduct of Business (MCOB) rules, provides a sufficient and robust framework of customer protections, while allowing for recourse through the justice system when maintaining mortgage payments is no longer sustainable for the borrower.

Approach during Covid-19

- From March 2020, lenders provided almost three million payment deferrals for mortgage borrowers and a 12-month moratorium on possessions was in place until April 2021.
- In addition, lenders pro-actively agreed to a [voluntary moratorium](#) on possessions, providing certainty for customers during Christmas and New Year.
- We represented mortgage lenders on the Master of Rolls Working Group on Possessions and mortgage lenders voluntarily adopted the prioritisation principles set out in the Overall Arrangements to enable an orderly and cautious re-start to possession proceedings. We now represent mortgage lenders on the Possession Court Users Committee.

Consultation Questions

26. Do you wish to answer questions about housing protocols?

Yes

32. Mortgage Possession PAP - Do you agree that the PAP should be mandatory?

Yes.

In practice, lenders already treat the PAP as mandatory for possession claims based on mortgage or home purchase plan arrears in respect of residential property. Amending the language to make this clear will provide certainty to the courts and consistency across all cases.

There may be individual customer circumstances where discretion is required. For these cases, we recommend that a clause be inserted to allow the claimant to demonstrate why the PAP would not be applicable on an exception basis.

33. Do you agree that the PAP should apply to all mortgage possession claims relating to residential property, including 'buy to let' mortgages?

Other.

In principle, members of UK Finance support the intention to apply the PAP to Buy-to-Let (BTL) mortgages.

However, the requirements of the existing PAP are tailored to the needs of residential mortgage borrowers, who typically reside in the property. Substantial revisions will be required for the PAP to sensibly apply to BTL mortgages.

Conduct standards apply to the sale, underwriting and administration of a BTL mortgage. These include arrears management. Where a BTL mortgage borrower has fallen into arrears, the lender will assess the individual circumstances of the borrower, as with residential mortgages. However, they will also assess whether the borrower is experiencing either a decline in rental income, an increase in costs to maintain the property, or both – typical reasons for the accrual of BTL mortgage arrears. In general, forbearance options may include those as set out in the Mortgage Possession PAP section 7.1.

We recommend that, if this proposal is implemented, the PAP is amended to include a separate section or a specific, bespoke PAP is drafted to reflect the difference in circumstances for BTL mortgage borrowers, where there is reduced risk of the borrower becoming homeless or requiring re-housing due to repossession. We would be happy to contribute to the CJC Housing Sub-Committee's work to amend the PAP.

We also recommend that consideration be given to circumstances where an LPA receiver or fixed charge receiver has been appointed. We do not think that the PAP applies where a possession claim is started by a receiver.

We note that the consultation does not make explicit comment on the scope of the PAP. Members agree that the PAP should continue to apply to possession claims based on mortgage or home purchase plan arrears. We do not think that the CJC intends to expand the scope of the PAP to apply to possession claims that are brought due to non-arrears breach of contract, nor would we support this expansion.

34. Do you agree that the PAP should be amended to require that occupiers are notified of steps taken under the Protocol that are likely to lead to a possession claim being made?

No.

Whilst supportive of the intent, we do not consider implementation of this proposal to be feasible.

A mortgage is a private contract between a lender and borrower. Lenders will have consent to provide information of the mortgage to the named parties of the contract, in accordance with the General Data Protection Regulation. Providing information of the mortgage to other parties, including the terms of any forbearance arrangements and the borrower's ability to meet the arrangement to pay, will require express consent. Additionally, a significant proportion of mortgage claims are started due to a borrower's lack of/unwillingness to engage with the lender. It would not be practicable to communicate with the occupiers of a property in these instances.

Where there is a tenant in the property, the lender will typically take possession subject to the terms of the tenancy. Where an LPA Receiver has been appointed, the receiver will act as agent of the borrower, including provision of information to the occupier(s).

We also note that direct communications to occupiers of the property who are not party to the mortgage may result in unintended consequences, such as jeopardy to existing tenancy agreements or potential damage to the property.

35. Do you agree that the PAP should be amended so as to provide standard information to borrowers about the powers of the court?

Yes.

We agree that standard information be provided by the courts to Defendants about the limits of the courts' powers.

We suggest that, if implemented, standard information is developed and maintained by the Courts and Tribunals Service. We also suggest that the CJC explores appropriate mechanisms to provide this information to borrowers including via existing systems.

36. Do you agree that the PAP should be amended to require lenders to write to the borrowers to inform them of the time and date of the hearing and the importance of attending?

Other.

As a matter of good practice lenders (either directly or via their panel law firms) provide borrowers with information on the date and time of the hearing and are required under the FCA's conduct rules to signpost customers to relevant debt, legal and housing advice. Lenders are also already required to meet extensive communication requirements set out in the FCA's rules, whilst balancing the requirement not to unduly pressure customers in arrears.

We do not think that additional communication about attendance at court will have a material beneficial impact on a borrower's decision to engage. We suggest that, if implemented, lenders could demonstrate compliance with the PAP by meeting existing communication requirements and efforts to engage the borrower.

37. Do you agree that the PAP should be amended to make reference to other forms of ADR available, such as the Business Banking Resolution Service?

No.

We do not think that this information is relevant in cases involving a property that is occupied as a home.

If you have any questions relating to this response, please contact [REDACTED] Principal,
Mortgages at [REDACTED]

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[REDACTED]
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