MORTGAGE ARREARS PROTOCOL

RESPONSE TO CIVIL JUSTICE COUNCIL CONSULTATION PAPER BY

THE COUNCIL OF HER MAJESTY'S CIRCUIT JUDGES

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1. Protocols have become a growth industry. They already take up 136 pages in the White Book, which, despite the expressed intention of the CPR to simplify litigation, not complicate it, has grown from 3930 pages in 1997 to 5984 in 2007. This is an increase of approximately 52%. It is most certainly not simplification. One of the laudable aims of the CPR was to make the civil justice system more accessible, and especially so for non professional litigants. It cannot be said that a requirement to comply with complex and prescriptive protocols before starting proceedings makes for easier access. Quite the reverse.

2. It is of course desirable that parties should communicate with each other and endeavour to settle their disputes before issuing proceedings. But what is properly to be required is that they should take reasonable steps to exchange relevant information, and then endeavour to avoid litigation by means of discussion and settlement. What is reasonable will vary almost infinitely with circumstances. It is not in our view either necessary or appropriate to set out in explicit detail what ought to be done in every case.

3. Furthermore, court time is not best spent in close analysis of whether or not a detailed protocol has been followed in every particular. The question should be a broad and simple one: have the parties acted reasonably before starting proceedings?

4. The purpose of protocols is summarised at C1A-001 in the White Book, namely : to highlight the desirability of settlement without litigation; to exchange such information as is reasonably needed; to make appropriate offers; and, if settlement cannot be agreed, to lay the ground for the expeditious conduct of proceedings.

5. Proposals in the draft mortgage possession protocol open up a number of areas which go well beyond stipulations about disclosure and discussion. For example: (a) 'Unreasonable pressure' is not to be put upon a borrower. Even if such an injunction was proper material for a protocol, what is reasonable pressure? Trial experience shows that a proportion of borrowers will only respond to real pressure, preferring to spend their money in other directions before attending to the mortgage provider. Does this mean that lenders must not try very hard to recover the money they are owed? And that if they do try hard will they not be allowed to recover? This would be a major, vague and potentially highly contentious provision. It should not be in a protocol. (b) Lenders should try to agree 'affordable sums'. Parties are likely to have very different ideas about what sums are affordable. (c) There is an extraordinary and quite unrealistic suggestion that proceedings should not be started if an application for benefits has been made. Practical experience of trying this sort of case shows that a very frequent assertion made by borrowers who have no intention of paying if they can get away with it is that they have been applying for benefits for months without any result. This provision would enable any borrower to thwart any attempt to recover from him simply by making an application for benefits. It would be a most effective, non statutory bar to an

action. This sort of thing should not be in a pre-action protocol. (d) An even stranger and potentially extremely onerous suggestion is made that lenders should offer to assist borrowers in their claims for welfare benefits. Are lenders to have to set up departments and engage staff to engage with the social security system? This would be very expensive. It would be likely to give rise to questions of conflict of interest. Are borrowers going to be able to claim that they need not pay what they have contracted to pay because the lender has not tried hard enough to get money out of the taxpayer? It must be for borrowers or their agents to apply for their own benefits. (e) There is even a proposed obligation for lenders to 'disclose to borrowers what they know of their benefit position'. (f) It is also suggested that lenders should take over, or perhaps back up, the established function of the court service in notifying borrowers of hearing dates. Are borrowers to have an equivalent obligation in relation to any applications they may be disposed to make? This should not appear in a proposed protocol. It is quite impracticable too, courts often have to alter hearing dates.

6. There is a very strange proposal that the court should be notified of the reasons why parties have reached agreements. This is quite alien to the normal practice whereby parties, for whatever reason, seek to settle their disputes and merely notify the court of the outcome. What is it expected that 'the court' should do with this knowledge? Is it to be brought to the attention of a judge, and if so what is he supposed to do about it? What if he feels that it is a bad reason? Or is it merely a letter to go on the court file, as it is closed when the dispute has compromised? In that case it is simply a further pointless cost to be incurred.

7. It will be apparent from the forgoing that the Council of circuit judges is not enthusiastic about the multiplication of highly prescriptive protocols. It is in particular opposed to putting into protocols obligations which have nothing to do with reasonable disclosure and the desirability of talking with a view to settlement. This one seems in a number of respects to go well beyond, and unacceptably beyond, the proper scope of a document regulating pre-litigation intercourse between the parties.

8. There is something to be said for a general pre- action protocol, which the Civil Justice Council is currently considering. But this should be a simplifying measure, applicable to all cases, not a complicating measure (such as is apparently envisaged) applying a protocol to cases where no protocol presently exists.

9. However, having said all this, it is appreciated that a protocol governing the relationship between mortgage providers and mortgagors might have some beneficial effect, in that a proportion of borrowers might be legitimately assisted, and lenders not unreasonably handicapped, by some of the requirements suggested (not those discussed above). A substantially modified proposal, on which we would appreciate further consultation, might be acceptable.

The answers to the questions.

1. See paragraph 9
2. Not applicable to the judiciary. It will clearly add to costs.
3. We cannot say.
4. These are simply commonsense.

5. If a party has acted unreasonably (and only if) then a costs sanction.
6. Other comments. See paragraphs 1 to 9 above.

His Honour Judge Harris Q.C.
Chairman
Civil Sub-Committee
Her Majesty's Council of Circuit Judges
6th April 2008