

Glasgow Advice & Information Network

Housing debt & other priority debts

Thursday 15 June 2023

Glasgow Royal Concert Hall

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LAW
CENTRE

Workshop structure

- **Proposed extension to the Cost of Living (Tenant Protection) (Scotland) Act 2022**
- **June 2022 Scottish Government Statement of Reasons**
- **Private Rented Sector (PRS) eviction/defence grounds**
- **Scottish Secure Tenancies (SST) eviction/defence grounds**
- **Reasonableness – case law**
- **Mortgage repossession – defence grounds & caselaw**
- **Financial Conduct Authority (FCA) MCOB rule 13.3**
- **FCA CONC rule 7.3 – consumer credit debt**
- **FCA fg23-2 guidance on mortgage arrears**
- **Use of the Financial Ombudsman Service (FOS) and Judicial Review**
- **Income maximisation; debt solutions; DAS moratorium**
- **DISCUSSION ON HORIZON ISSUES: including Bank of England Base Rate; fixed rates; end of the 2022 Act protections for tenants**

Cost of Living (Tenant Protection) (Scotland) Act 2022

Draft regulations now laid to extend Part 1 of the 2022 Act (final extension) to **31 March 2024**. The main impact of the 2022 Act is:

- **Temporary cap on in-tenancy rent increases** for the majority of private sector tenancies (initially set at 0%), backdated to 6 September 2022 in order to prevent landlords seeking to increase a tenant's rent between the Programme for Government announcement of the 'rent freeze' and commencement of the Act.
- The 'permitted rate' (the 'rent cap') has been **set at 3% since 1 April 2023** and applies to most existing tenancies in the private rented sector. There are no restrictions on rent setting for any new tenancies; the rent cap only restricts in-tenancy rent increases.
- Notwithstanding the rent cap, **landlords have a safeguard available to them and can apply to Rent Service Scotland (RSS) to increase the rent for a let property above the rent cap (up to 6%)** in connection with the recovery of up to 50% of defined 'prescribed property costs' – see over/

Cost of Living (Tenant Protection) (Scotland) Act 2022

The term “prescribed property costs” is defined by new section 33A of the Private Housing (Tenancies) (Scotland) Act 2016:

- (4) In this Chapter, “prescribed property costs”, in relation to a landlord, are—
- (a) interest payable in respect of a mortgage or standard security relating to the let property,
 - (b) a premium payable in respect of insurance (other than general building and contents insurance) relating to the let property and the offering of the property for let,
 - (c) service charges relating to the let property that are paid for by the landlord but the payment of which the tenant is responsible for (in whole or in part) in accordance with the terms of the tenancy.

Cost of Living (Tenant Protection) (Scotland) Act 2022

The main impact of the 2022 Act is:

- **Eviction pause** - a landlord is prevented from enforcing an order for eviction while the moratorium is in effect, the enforcement of that order can only be delayed for a maximum period of 6 months.
- The moratorium does not apply where
 - landlord intends to sell the let property due to financial hardship (private sector only);
 - landlord intends to live in the let property due to financial hardship (private sector only);
 - **tenant has substantial rent arrears which add up to 6 months' rent or more in the private rented sector, or £2,250 or more in the social rented sector.**
- Furthermore, the moratorium does not apply where
 - tenant has engaged in antisocial or criminal behaviour (student residential tenancies, private and social sectors);
 - the tenant has abandoned the property (private and social sector);
 - where the property is to be sold by a lender (private sector only);
 - the tenant is no longer an employee of the landlord (private and social sector); and
 - the property is subject to demolition or requires substantial work and suitable alternative accommodation will be available for the tenant (social sector only).

Cost of Living (Tenant Protection) (Scotland) Act 2022

The main impact of the 2022 Act is:

- Amends section 37 and 38 of the Housing (Scotland) Act 1988 re quantification of damages for unlawful eviction (section 23, Rent (Scotland) Act 1984)
- Determination of damages, section 37, 1988 Act
 - (1) For the purpose of section 36(3), the damages that the court or, as the case may be, the First-tier Tribunal may determine as payable are to be an amount which is—
 - (a) not less than 3 months' rent, and**
 - (b) not more than 36 months' rent, taking into account the manner of the unlawful eviction and the impact that it has had on the tenant.**
 - (2) But, the court or, as the case may be, the First-tier Tribunal may reduce the amount of damages that would otherwise be payable under subsection (1) to an amount lower than 3 months' rent if it considers it appropriate to do so having regard to all the circumstances of the case.

Statement of Reasons (SG/2023/100)

Updated economic context

- 4.3 According to recent YouGov polling for the Scottish Government, in late March 2023, **levels of concern about paying mortgage/rent were twice as high in the private rented sector than across all tenures as a whole** (22% for private renters compared to 11% for all tenures). **Private renters were also more likely to say that they were struggling to pay for household bills**, including energy bills and rent at least a little and that they were managing less well financially (30% of private renters compared to 22% all tenures as a whole).
- There has been **no significant improvement in these figures since November 2022**.
- In March 2023, a majority of private renters (63%) reported that their mental health had been impacted negatively by the cost of living.
- April 2023, 341,110 PRS properties on the Scottish Landlord Register

Statement of Reasons (SG/2023/100)

Financial profile of households in Scotland

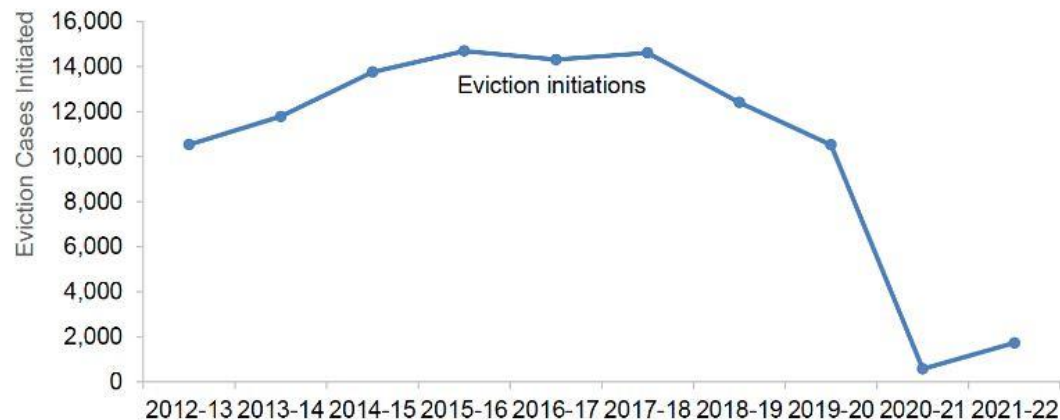
- 6.3.20 Social rented households are more likely to have lower incomes than households in other tenures, with Scottish Household Survey results for 2019 showing 60% of social rented households having a net income of £20,000 or less, compared to 38% of private rented households, 41% of households who own outright, and 14% of households buying with a mortgage.
- 6.3.21 Social rented households are also more likely to be financially vulnerable (defined as households with savings which would cover less than one month of income at the poverty line), with Scottish Government Statistics on Wealth in Scotland²⁴ showing 63% of social rented households being estimated to be financially vulnerable, compared to 40% of private rented households, 24% of households buying with a mortgage and 9% of households owning outright.
- 6.3.22 Around two-thirds (66%) of social rented households are receiving some level of support for housing costs through Housing Benefit or Universal Credit, with the equivalent figure for private rented sector households being 29%

Statement of Reasons (SG/2023/100)

Eviction data & Civil Justice statistics

- 6.3.7 As of 30 May 2023, data from the First-tier Tribunal (Housing and Property Chamber) shows that there have been a total of 1,412 applications for eviction from September 2022 to 30 May 2023. This is an increase from the same period the previous year, when there were 1,133 applications for evictions, although volumes in the previous year will have been impacted on by eviction measures in place through the Coronavirus (Scotland) Act 2020.
- 6.3.10 In the social rented sector only summary cause data from the Scottish Courts is available. Latest available figures on the total number of social sector summary cause eviction applications registered at courts show a decrease over the period since August 2022, with the number of applications registered falling from 458 in August 2022 to 308 in March 2023.

Figure 8: Eviction actions initiated in 2021-22 rose from last year but still far below pre-pandemic levels



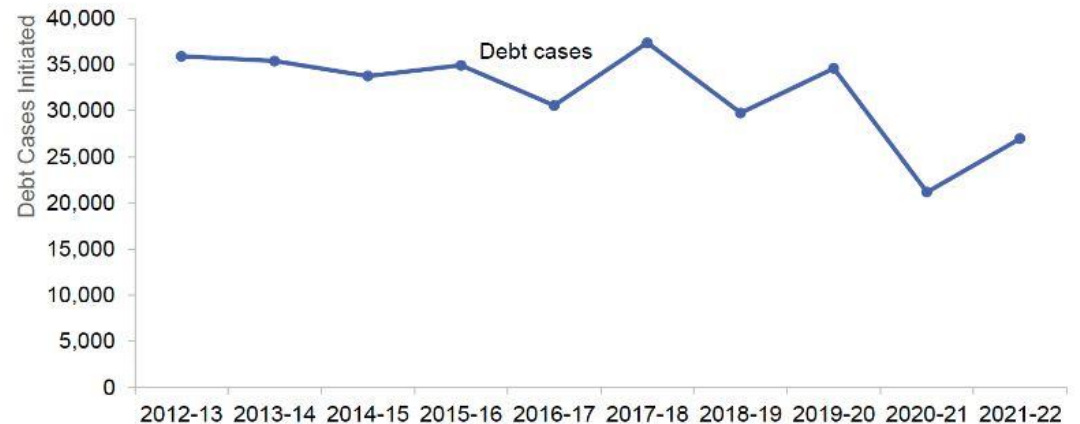
Civil Justice Statistics

- <https://www.gov.scot/publications/civil-justice-statistics-scotland-2021-22/pages/5/>
- Published 25 April 2023 for 2021/22

Figure 14: Repossessions in 2021-22 rose from last year but still below pre-pandemic levels



Figure 7: Debt cases initiated have recovered from last year, but still below pre-pandemic levels



PRS evictions

- 21 discretionary grounds in schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2022 (before Covid-19 there were 10 mandatory grounds, but now discretionary including three temporary Cost of Living grounds)
- “Reasonable on account of that fact” cf. narrower than for social rented sector or mortgage repossessions statutory language
- Look at the key rent arrears eviction grounds, paragraphs 12 and 12A

Paragraph 12A

 Law In Force With Amendments Pending

[12A Substantial rent arrears

- (1) It is an eviction ground that the tenant has substantial rent arrears.
- (2) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if—
 - (a) the tenant has accrued rent arrears under the tenancy in respect of one or more periods,
 - (b) the cumulative amount of those rent arrears equates to, or exceeds, an amount that is the equivalent of 6 months' rent under the tenancy when notice to leave is given to the tenant on this ground in accordance with section 52(3), and
 - (c) the Tribunal is satisfied that it is reasonable to issue an eviction order.
- (3) In deciding under sub-paragraph (2) whether it is reasonable to issue an eviction order, the Tribunal is to consider—
 - (a) whether the tenant being in arrears of rent over the period or periods in question is wholly or partly a consequence of a delay or failure in the payment of a relevant benefit,
 - (b) the extent to which the landlord has complied with the pre-action protocol prescribed by the Scottish Ministers under paragraph 12(4)(b) (and continued in force by virtue of section 49 of the Coronavirus (Recovery and Reform) (Scotland) Act 2022).
- (4) For the purpose of this paragraph—
 - (a) references to a relevant benefit are to—
 - (i) a rent allowance or rent rebate under the Housing Benefit Regulations 2006 (S.I. 2006/213),
 - (ii) a payment on account awarded under regulation 93 of those Regulations,
 - (iii) universal credit, where the payment in question included (or ought to have included) an amount under section 11 of the Welfare Reform Act 2012 in respect of rent,
 - (iv) sums payable by virtue of section 73 of the Education (Scotland) Act 1980,
 - (b) references to delay or failure in the payment of a relevant benefit do not include any delay or failure so far as it is referable to an act or omission of the tenant.

Paragraph 12

[12 Rent arrears

(1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months.

(2) [...]²

(3) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if—
(a) for three or more consecutive months the tenant has been in arrears of rent, and
(b) the Tribunal is satisfied that it is reasonable on account of that fact to issue an eviction order.

(4) In deciding under sub-paragraph (3) whether it is reasonable to issue an eviction order, the Tribunal is to consider [—]³

[(a) whether the tenant's being in arrears of rent over the period in question is wholly or partly a consequence of a delay or failure in the payment of a relevant benefit, and
(b) the extent to which the landlord has complied with the pre-action protocol prescribed by the Scottish Ministers in regulations.]³

(5) For the purposes of this paragraph—

(a) references to a relevant benefit are to—

- (i) a rent allowance or rent rebate under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971),
- (ii) a payment on account awarded under regulation 91 of those Regulations,
- (iii) universal credit, where the payment in question included (or ought to have included) an amount under section 11 of the Welfare Reform Act 2012 in respect of rent,
- (iv) sums payable by virtue of section 73 of the Education (Scotland) Act 1980,

(b) references to delay or failure in the payment of a relevant benefit do not include any delay or failure so far as it is referable to an act or omission of the tenant.

[(6) Regulations under sub-paragraph (4)(b) may make provision about—

(a) information which should be provided by a landlord to a tenant (including information about the terms of the tenancy, rent arrears and any other outstanding financial obligation under the tenancy),

(b) steps which should be taken by a landlord with a view to seeking to agree arrangements with a tenant for payment of future rent, rent arrears and any other outstanding financial obligation under the tenancy,

(c) such other matters as the Scottish Ministers consider appropriate.

SST evictions

16 Powers of court in possession proceedings

- (1) The court may, as it thinks fit, adjourn proceedings under [section 14](#) on a ground set out in any of [paragraphs 1 to 7](#) and [15 of schedule 2](#) for a period or periods, with or without imposing conditions as to payment of outstanding rent or otherwise.
- (2) Subject to subsection (1), in proceedings under [section 14](#) the court must make an order for recovery of possession if it appears to the court—
 - (a) that—
 - (i) the landlord has a ground for recovery of possession set out in any of [paragraphs 1 to 7](#) of that schedule and specified in the notice required by [section 14](#), and
 - (ii) it is reasonable to make the order,
- (3) For the purposes of subsection (2)(a)(ii) the court is to have regard, in particular, to—
 - (a) the nature, frequency and duration of—
 - (i) where the ground for recovery of possession is one set out in any of [paragraphs 1 and 3 to 7 of schedule 2](#), the conduct taken into account by the court in concluding that the ground is established,
 - (ii) where the ground for recovery of possession is that set out in [paragraph 2](#) of that schedule, the conduct in respect of which the person in question was convicted,
 - (b) the extent to which that conduct is or was conduct of, or a consequence of acts or omissions of, persons other than the tenant,
 - (c) the effect which that conduct has had, is having and is likely to have on any person other than the tenant, and
 - (d) any action taken by the landlord, before raising the proceedings, with a view to securing the cessation of that conduct.

SST evictions

Housing (Scotland) Act 2001 asp 10 (Scottish Act)

Schedule 2 SCOTTISH SECURE TENANCY: GROUNDS FOR RECOVERY OF POSSESSION OF HOUSE

para. 1

...

1

Rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy has been broken.



Law In Force

Version 1 of 1

30 September 2002 - Present

Schedule 2 SCOTTISH SECURE TENANCY: GROUNDS FOR RECOVERY OF POSSESSION OF HOUSE >

Part 1 GROUNDS ON WHICH COURT MAY ORDER RECOVERY OF POSSESSION > para. 1

Reasonableness

C. A.

CRESSWELL v. HODGSON.

1951
Feb. 15, 16.

[Plaint F. 3161.]

Somervell,
Singleton and
Denning, L.JJ.

Landlord and tenant—Rent restriction—Weekly tenancy—Possession—Suitable alternative accommodation offered at increased rent—Suitability to means of tenant—Landlord's reasons for desiring possession—Reasonableness—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32), s. 3, sub-s. 1 (b).

In considering whether it would be reasonable to make an order for possession of a dwelling-house controlled by the Rent Acts the county court judge is given a very wide discretion. He must look into the effect of such an order on each party and is entitled to take into consideration the fact that the landlord is seeking to make a pecuniary gain.

of the tenant were concerned. I think that, when Parliament gave this overriding discretion to the county court judge and said " You must consider whether it is reasonable to make an order ", it gave him a very wide discretion, which it is most undesirable to seek to limit or interfere with. I think the words of the section themselves indicate that the county court judge must look at the effect of the order on each party to it. I do not see how it is possible to consider whether it is reasonable to make an order unless you consider its effect on landlord and tenant, firstly, if you make it, and secondly, if you do not. I do not think we should say anything which restricts the circumstances which the county court judge should take into consideration. I

Lord Justice
Somervell, at page
95

1951 2 K.B. 92

England & Wales
Court of Appeal

Mortgage repossession

■ Bank of Scotland v. Gallacher 2013 HOUS LR 36

Heritable creditors raised an action seeking recovery of possession of subjects held under a standard security. It was not disputed that the defender was in substantial arrears. When granting decree the sheriff stated in relation to the debtor's ability to secure reasonable alternative accommodation in terms of s.24(7)(e) of the 1970 Act that no information had been put forward by the defender and no request had been made for time to obtain alternative accommodation. The defender appealed.

HELD, that the sheriff went too far too quickly by granting decree on the basis of the information before him where the requirement to "have regard to" the ability of the defender to secure alternative accommodation could not be met by a lack of information or the absence of a request for a continuation to secure accommodation (paras 8–9); and appeal *allowed*.

OBSERVED, that it would be undesirable for an appellate court to attempt to lay down rules, or even attempt guidance, as to the circumstances in which written answers were necessary in a case of this type (para.7).

ACTION

The Bank of Scotland Plc raised an action against [redacted] Gallacher seeking recovery of possession of heritable subjects held under a standard security. The sheriff granted decree.

The defender appealed.

The appeal was heard before the sheriff principal (E F Bowen, QC).

On 30 April 2013 the sheriff principal *allowed* the appeal.

[3] By virtue of subs.(5) of s.24 of the 1970 Act, the sheriff could not grant the pursuers' motion unless he was satisfied that it was reasonable in the circumstances of the case to do so. That discretionary power is circumscribed by the provisions of subs.(6) and (7), which require the court, where the debtor appears or is represented, to have regard to certain particular matters, namely: (a) the nature and reasons for the default; (b) the ability of the debtor to fulfil within a reasonable time the obligations under the standard security in respect of which the debtor is in default; (c) any action taken by the creditor to assist the debtor to fulfil those obligations; (d) where appropriate, participation by the debtor on a debt payment programme; and (e) the ability of the debtor and any other person residing at the security subjects to secure reasonable alternative accommodation.

[4] The sheriff was, of course, alive to these requirements. In his note he sets out in relation to (a) that no satisfactory explanation was put forward as to why the arrears had accumulated to such an extent other than some periods of unemployment; and in relation to (b) that "the arrears were over £18000. No payment had been made since 25 May 2012. There was nothing to suggest that the arrears could have been cleared within a reasonable time". In respect of (c) he states that "the lender had given a number of opportunities to the appellant to deal with or discuss his arrears but he had not taken these". He states that no information was given as to participation in a debt arrangement programme (d). Finally, in relation to (e) the sheriff states: "Again nothing was put forward by the agent in that regard. I was not told anything about the appellant's particular needs. The thrust of the agent's submission was to obtain further time to allow the appellant to apply for jobseeker's allowance and to try to obtain assistance with regard to payment of mortgage interest. There was no

Mortgage repossession

■ HSBC Bank Plc v. Collinge 2014 HOUS LR 78

HELD, (1) that the sheriff properly considered all the statutory matters to which he was obliged to give attention and was correct to conclude that his task was to determine whether he was satisfied in the whole

2014 Hous. L.R. 78

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REPORTS

HSBC Bank Plc v Collinge

circumstances that it was reasonable to grant the pursuer's application (para.17); (2) that the sheriff's decision was one which he was entitled to make in the exercise of his discretion in light of all the information before him and the court was not prepared to interfere with his decision: the sheriff had properly considered all the matters referred to in s.24(7)(a)–(e) of the 1970 Act; it could not be said that the appellants were in a position to fulfil their obligations within a reasonable time and the two offers which had been made involved the respondent in accepting a substantial compromise; there was no evidence available to the sheriff to demonstrate how the appellants could fulfil either of the offers which had been made; the provision of financial information was key to the respondent assessing the quality of the offer made and there was no information to support the proposals made (paras 18–20); and appeal *refused*.

ACTION

HSBC Bank Plc, the creditor in standard securities

(e) the ability of the debtor and any other person residing at the security subjects to secure reasonable alternative accommodation."

CASES REFERRED TO

Cheltenham and Gloucester Building Society v Morgan [1996] 1 W.L.R. 343; [1996] 1 All E.R. 449.
Hoblyn v Barclays Bank Plc [2013] CSOH 104; 2014 Hous. L.R. ?.

TEXTBOOKS REFERRED TO

Macphail, *Sheriff Court Practice*, para.18.111.

The appeal was heard before the sheriff principal (B A Lockhart).

On 20 August 2014 the sheriff principal *refused* the appeal.

THE SHERIFF PRINCIPAL (B A LOCKHART).—

Background to the appeal

Mortgage repossession

- **Cheltenham & Gloucester Building Society v. Norgan**
1996 1 W.L.R 343, England & Wales Court of Appeal

On appeal by the defendant:—

Held, allowing the appeal and remitting the case to the county court, that in the absence of unusual circumstances the outstanding term of the mortgage was the starting point in determining how long it would be reasonable to keep a mortgagee out of possession so as to give the mortgagor time to pay any sums due under the mortgage; that the court at the outset should resolve disputes over how much of the arrears should be attributed to interest and how much to principal and consider whether the mortgagee's security was likely to be put at risk by the delay and whether the mortgagor would be able to maintain repayment of arrears by instalments over the outstanding term of the mortgage; and that in the circumstances the judge had erred in adopting a repayment period unrelated to the outstanding term of the mortgage (post, pp. 353D–E, H–354B, G–H, 355A–B, D–E, F, 356E–F, 357B–D).

Dictum of Scarman L.J. in *First Middlesbrough Trading and Mortgage Co. Ltd. v. Cunningham* (1974) 28 P. & C.R. 69, 75, C.A. applied.

Western Bank Ltd. v. Schindler [1977] Ch. 1, C.A. considered.

C

D

E

FCA's MCOB rule 13.3

MCOB 13.3.4A

In complying with *MCOB 13.3.2AR(6)*:

R

26/04/2014

(1) a *firm* must consider whether, given the individual circumstances of the *customer*, it is appropriate to do one or more of the following in relation to the *regulated mortgage contract* or *home purchase plan* with the agreement of the *customer*.

(a) extend its term; or

(b) change its type; or

(c) defer payment of interest due on the *regulated mortgage contract* or of sums due under the *home purchase plan* (including, in either case, on any *sale shortfall*); or

(d) treat the *payment shortfall* as if it was part of the original amount provided (but a *firm* must not automatically capitalise a *payment shortfall* where the impact would be material); or

(e) make use of any Government forbearance initiatives in which the *firm* chooses to participate;

(2) a *firm* must give *customers* adequate information to understand the implications of any proposed arrangement; one approach may be to provide information on the new terms in line with the *annual statement provisions*.

FCA's guidance fg23/2



Finalised Guidance

Guidance for firms supporting their existing mortgage borrowers impacted by the rising cost of living

FG23/2

10 March 2023

FCA's guidance fg23/2

Contract variations for the purposes of forbearance

- 2.11 Firms may vary a contract without assessing affordability (as set out in MCOB 11.6.2R) when doing so solely for the purposes of forbearance where the customer has a payment shortfall, or in order to prevent one occurring (MCOB 11.6.3R(3)). This could include a contract variation which switches a repayment mortgage onto an interest-only basis for all or part of its term, or extends the mortgage term into (or further into) retirement.
- 2.12 When dealing with a customer who is in or at risk of payment shortfall, firms may, where appropriate, vary a contract to accept payment on an interest-only basis for a temporary period without evidence of a clearly understood and credible repayment strategy (MCOB 11.6.43R). A variation is unlikely to be considered appropriate and temporary if, after the temporary period is over, the customer is not obliged to make payments of interest and capital which are designed to repay the mortgage in full over the remaining term.
- 2.13 If permanently varying a contract to an interest-only mortgage, a firm would need to have evidence of a clearly understood and credible repayment strategy (MCOB 11.6.41R).
- 2.14 A firm would need to demonstrate that in offering a variation under forbearance it is acting fairly and in accordance with a customer's best interests (Principle 6, MCOB 2.5A), and that the change is appropriate to the customer's individual circumstances.

FCA's guidance fg23/2

Customers not requiring forbearance – but wanting to reduce their monthly payments (contract variations)

- 2.17 Firms may offer a range of contract variations to support borrowers who would like to reduce their monthly payments, and our rules allow this regardless of whether customers are facing payment difficulties. Not all firms will be able to offer contract variations. A firm can vary or replace an existing contract without undertaking an affordability assessment provided there is no additional borrowing or change to its terms which is likely to be material to affordability (MCOB 11.6.3R).

Interest rate switches

- 2.18 Firms may offer borrowers the ability to switch their interest rate. Where there are no other changes to the terms of their contract, and the interest rate change is not material to affordability, the requirement to undertake an affordability assessment will not apply (MCOB 11.6.3R).
- 2.19 A borrower may be switching from an expiring fixed (or otherwise incentivised) rate to a higher incentivised or fixed rate. To determine whether this change would be material to affordability (and therefore whether the requirement to undertake an affordability assessment will apply) firms can compare the proposed new rate to the rate the customer would pay if not for the change – such as any standard variable rate (SVR) that would apply once the current deal expires.

FCA's guidance fg23/2

Term extensions

- 2.20 Some customers seeking to reduce their monthly payments may want to extend the term of their mortgage. An affordability assessment will not generally be required for term extensions up to the customer's expected retirement age if there are no other changes to the terms of the mortgage (MCOB 11.6.3R).
- 2.21 Where the term is extending into (or further into) retirement, it is more likely that the change would be material to affordability (see MCOB 11.6.4E), in which case an affordability assessment would be required.

Variation to interest-only

- 2.22 Some borrowers seeking to reduce their monthly payments may want to switch their repayment mortgage onto an interest-only basis for all or part of its remaining term.
- 2.23 A firm may agree to vary a contract from a repayment mortgage to an interest-only mortgage (permanently or temporarily) if it has evidence that the customer will have in place a clearly understood and credible repayment strategy (MCOB 11.6.41R).

FCA's CONC rule 7.3

CONC 7.3.4

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01/04/2014



A *firm* must treat *customers* in default or in arrears difficulties with forbearance and due consideration.

[Note: paragraphs 7.3 and 7.4 of *ILG* and 2.2 of *DCG*]

s://www.handbook.fca.org.uk/handbook/CONC/7/3.html

1/4

06/2023, 12:44

CONC 7.3.5

G

01/04/2014



CONC 7.3 Treatment of customers in default or arrears (including repossessions): lenders, owners and debt collectors - FC...

Examples of treating a *customer* with forbearance would include the *firm* doing one or more of the following, as may be relevant in the circumstances:

(1) considering suspending, reducing, waiving or cancelling any further interest or charges (for example, when a *customer* provides evidence of financial difficulties and is unable to meet *repayments* as they fall due or is only able to make token *repayments*, where in either case the level of debt would continue to rise if interest and charges continue to be applied);

[Note: paragraph 7.4 (box) of *ILG*]

(2) allowing deferment of payment of arrears:

(a) where immediate payment of arrears may increase the *customer's repayments* to an *unsustainable* level; or

(b) provided that doing so does not make the term for the *repayments* unreasonably excessive;

(3) accepting token payments for a reasonable period of time in order to allow a *customer* to recover from an unexpected income shock, from a *customer* who demonstrates that meeting the *customer's* existing debts would mean not being able to meet the *customer's* priority debts or other essential living expenses (such as in relation to a mortgage, rent, council tax, food bills and utility bills).

Use of the Financial Ombudsman Service

- Strategy for difficult mortgage repossession cases? Seek a variation of contract/forbearance re the term, deferred payments etc., to make affordable bearing in mind the principles of Norgan; if refused pursue a complaint to the FOS.

Financial Services and Markets Act 2000 c. 8 s. 228 Determination under the compulsory jurisdiction.



Law In Force

Version 4 of 4

26 July 2013 - Present

Subjects

Financial regulation

Keywords

Complaints; Decisions; Financial Ombudsman Service; Notification; Statements

228.— Determination under the compulsory jurisdiction.

- (1) This section applies only in relation to the compulsory jurisdiction [...] ¹ .
- (2) A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case.
- (3) When the ombudsman has determined a complaint he must give a written statement of his determination to the respondent and to the complainant.
- (4) The statement must—
 - (a) give the ombudsman's reasons for his determination;
 - (b) be signed by him; and
 - (c) require the complainant to notify him [...] ² , before a date specified in the statement, whether he accepts or rejects the determination.
- (5) If the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and final.
- (6) If, by the specified date, the complainant has not notified the ombudsman of his acceptance or rejection of the determination he is to be treated as having rejected it.

Judicial Review

- (1) Declarator that the dismissal of complaint without consideration of the merits purportedly in terms of Rule 3.3.4(8), (9) and (10) of the Dispute Resolution: Complaints Handbook (DISP) made by the Financial Conduct Authority in exercise of powers under sections 137A, 137T and 139A of the Financial Services and Markets Act 2000 ("the Act") is *ultra vires*, null and of no effect;
- (2) Suspension of the said purported dismissal of complaint;
- (3) A finding of expenses against the respondents.

The petitioner craves the court to pronounce such further order, decrees or orders as may seem to the court to be just and reasonable in all the circumstances of the case.

4. The petitioner challenges the decision of the respondents on the following grounds:
 - (a) that the decision was *ultra vires* of the respondents;
 - (b) that the decision proceeded in wilful ignorance of a material consideration;
 - (c) that the decision proceeded on a mistake of fact;
 - (d) that the decision was wholly unreasonable and perverse.

Income maximisation; debt solutions; DAS moratorium

- Social security law and social welfare law advice
- Debt solutions – DAS, sequestration, interim solutions, time to pay directions Debtor (Scotland) Act 1987 or Consumer Credit Act 1974 time orders
- DAS moratorium – Bankruptcy (Scotland) Act 2016

✓ Law In Force

197 Moratorium on diligence following notice under section 195(1) or 196(1)

- (1) This section applies where a person gives notice under section 195(1) or 196(1).
- (2) A moratorium on diligence applies in relation to the person who is the subject of the notice for the moratorium period determined in accordance with section 198.
- (3) While a moratorium on diligence applies in relation to the person it is not competent—
 - (a) to serve a charge for payment in respect of any debt owed by the person, or
 - (b) to commence or execute any diligence to enforce payment of any debt owed by the person,
 - (c) to found on any debt owed by the person in presenting, or concurring in the presentation of, a petition for sequestration of the person's estate, or
 - (d) where an arrestment mentioned in subsection (1) of section 73J of the Debtors (Scotland) Act 1987 has been granted in respect of funds due to the person, to release funds to the creditor under subsection (2) of that section.

Income maximisation; debt solutions; DAS moratorium

■ DAS moratorium – Bankruptcy (Scotland) Act 2016

✓ Law In Force

[198 Period of moratorium

- (1) The moratorium period applying in relation to a person is the period which—
- (a) begins on the day on which an entry is made under section 195(3) or 196(3) in the register of insolvencies, and
 - (b) ends on—
 - (i) the day which is [6 months]² after that day,
 - (ii) such earlier day as is mentioned in subsection (2), or
 - (iii) if subsection (3), (5) or (7) applies, such later day as is determined in accordance with subsection (4), (6) or (8).
- (2) The earlier day is the day on which, in relation to the person who is the subject of the moratorium—
- (a) an entry is made in the register of insolvencies recording the award of sequestration of the estate,
 - (b) an entry is made in the register of insolvencies recording that a trust deed granted by the person has been granted or refused protected status,
 - (c) an entry is made in the DAS register recording the approval of a debt payment programme in accordance with section 2 of the 2002 Act, or
 - (d) written notice is given to AiB—
 - (i) by the person withdrawing the notice given under section 195(1), or
 - (ii) by or on behalf of the person withdrawing the notice given under section 196(1).

DISCUSSION ON HORIZON ISSUES: including Bank of England Base Rate; fixed rates; end of the 2022 Act protections for tenants

- **Over last 18 months the Base Rate has increased on 12 occasions from 0.1% to now 4.5% - MPC rise expected next week; may peak at 6%**
- **1.4 million fixed rate mortgages in the UK ending over next few months – around 115,000 in Scotland?**
- **Most fixed rates ending will result in jump from below 2% to now 6% or more ... per £100k equates to extra £424/£644 per month in interest**
- **Impact on consumer credit lending rates – repriced, credit card rates revised; less zero rate transfer deals**
- **Impact for tenants in Scotland when the 2022 Cost of Living Act protections end next March 2024?**
- **Cases more complex, higher levels of debt and more time consuming – implications for GAIN capacity and resources?**