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BRIEFING PAPER

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Mortgage repossession: tenants' rights (England and Wales)

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Summary

Private tenants can sometimes discover that their landlord has not been meeting his or her mortgage commitments when bailiffs appear on the doorstep with a warrant for possession of their home. Despite being up-to-date with their rent payments, affected tenants could find their security of tenure under serious threat.

This issue attracted a good deal of attention over 2008-09 and resulted in a Private Member's Bill which gained Government support and which strengthened the rights of tenants in this position. The *Mortgage Repossessions (Protection of Tenants etc.) Act 2010* and *The Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations* (SI 2010/1809)) came into force on 1 October 2010.

The Act does not prevent lenders from seeking repossession against tenants but it ensures that they should be notified of the proceedings and gives them more time to seek alternative accommodation where necessary.

There is Government guidance on the Mortgage Repossessions (Protection of Tenants etc.) Act 2010.

Shelter has a very helpful webpage which provides advice for tenants whose landlord has defaulted on their mortgage commitments.

This House of Commons Library briefing paper provides an overview of the legal position in relation to affected tenants and describes the changes introduced by the 2010 Act. Affected tenants are best advised to seek professional legal advice and assistance.

1. Tenants' rights: an overview

It is often the case that the first indication a private tenant has that their landlord has not been paying the mortgage is when the bailiffs appear with a warrant for possession of their home. Despite the fact that tenants may be up-to-date with their rent payments, they may be caught between the lender and the landlord in these circumstances.

1.1 Is the tenancy binding on the lender?

There are limited circumstances in which a tenant can claim a right to remain in their home in the face of the landlord failing to fulfil their mortgage commitments – these circumstances are outlined in the following 3 sections.

Overriding interest

Where the tenancy was granted *before* the inception of the mortgage, the tenant may be able to claim an "overriding interest" as a person in actual occupation, or as a person in occupation under a tenancy agreement for a term of years not exceeding seven years, which is binding on the lender under Schedules 1-3 of the *Land Registration Act 2002.* An overriding interest will prevent the lender from evicting the tenant without following due process.

There is a good deal of case law around the question of when a tenancy agreement will prevail over the mortgage. In the circumstances outlined below, a tenancy will be binding on a lender even where it has been created in breach of the mortgage agreement:

- Where, as a result of delays in registration, the landlord is registered as the legal owner of the property and grants a tenancy before the lender's charge is registered.[1]
- Where the landlord is the registered owner at the time the tenancy is created and has an existing mortgage, the tenancy will not be binding on the lender. However, if the landlord remortgages, and in so doing pays off the existing mortgage, then the new mortgage, which is registered *after* the tenancy has been created, *will* be binding on the new lender.
- Where the landlord changes during the lifetime of the tenancy the question arises as to how the purchase has been financed. If the property has been sold and the new owner finances the purchase with a new mortgage, the tenancy which would not have been binding against the original lender will be binding upon the new landlord's lender.

The lender agrees to the tenancy

Most mortgage agreements contain provisions requiring the borrower to obtain the lender's written consent before granting a tenancy. Often, specific consent to each individual tenancy is needed, even in buy-to-let mortgages. Therefore, it is important for a borrower to read the mortgage terms and conditions before granting a tenancy. If a

[1] *Barclays Bank v Zaroovabli* (1997) 2 All ER 19

tenancy has not been granted in breach of the mortgage terms it can be binding on the lender, i.e. the lender will not be able to seek possession against the tenant in these circumstances by bringing possession proceedings against the borrower. If this is attempted, the tenant can apply to be joined to the proceedings and can oppose possession. Alternatively, the lender can appoint a receiver to collect rent from the tenant.[2] If the tenant does not pay, then the lender would be able to take possession proceedings against the tenant in accordance with the terms of the tenancy agreement and/or any applicable statutory provisions.

In regard to buy-to-let mortgages, the Council of Mortgage Lenders included the following section in its response to the Ministry of Justice's review of mortgage remedies:

> Buy to let loans are commercial loans...there may well be a tenant or tenants in situ who do risk losing their home and it is consideration for those tenants that is paramount with buy to let loans. In some cases there is also a rental stream which is part of the value of the property.
>
> If a lender has a buy to let loan it can follow the court order route and obtain possession. It is however important to remember that an order for possession against the borrower is just that – it is not an order for possession against the tenant. Where there is a tenancy which is binding on the lender the lender will need to decide how best to proceed both for itself and the tenant(s).
>
> Assuming that the tenancy has lender consent (**and most buy to let loans imply consent so long as the tenancy complies with terms and conditions** – usually an assured shorthold) if the lender has a court order against the borrower and wants to sell with vacant possession it can only do what the borrower as landlord could have done to remove the tenant from the premises. In most cases this would be by serving a notice ending the tenancy or proving a ground for possession. Once the property is vacant because the tenancies have been brought to an end in accordance with legislation it is not always worthwhile the lender obtaining a court order against the borrower – it will only add to the borrower's costs for the lender to do so. The lender does not acquire better rights than the borrower.
>
> However in many buy to let cases the lender may choose to sell without vacant possession. The rental stream from the tenancies may actually be the main value attaching to the property so to sell with vacant possession would adversely affect the borrower. In these cases the lender may choose not to obtain an order for possession against the borrower at court and, following sale, the tenants simply have a new landlord. S101 affords protection to the borrower as it gives the borrower notice that he is in breach. The lender will either sell to a buyer directly or if its terms and conditions allow it to do so may appoint a receiver (see below) to do this.
>
> Again it is important to remember that the equity of redemption applies until exchange of contracts and that the common law duty

[2] If the power of sale has become exercisable the lender can appoint a receiver to receive any rental income from the property. Payment of rent in this way does not of itself create a new tenancy as the receiver is deemed to be the agent of the borrower not the lender under the *1925 Law of Property Act*.

> to obtain the best price reasonably available in an arms' length transaction applies.
>
> The LPA allows the lender to appoint a receiver. The receiver is the agent of the borrower and its main duties under the LPA are to collect rent and manage the security. A receiver's powers can be extended by the lender in its terms and conditions. Receivers appointed by lenders are often surveyors, lawyers, managing agents, asset managers or other professionals experienced in property management. Property management is now a very complex area and the use of professionals in this way affords protection to tenants.[3]

The section highlighted in bold indicates that the CML believes that a lender gives implied consent to a letting on granting a buy-to-let mortgage and that any such letting is binding upon the lender.

As a general rule, a tenancy granted in breach of the mortgage deed is not binding on the lender.[4]

Recognising the tenancy

This issue here is whether, for example, by knowingly accepting rent payments, a lender creates a tenancy between itself and the occupier. Whether such actions do in fact create a binding tenancy will depend on the circumstances of each individual case. The fact that a lender knows that a tenant is living in the property concerned will not, of itself, make the tenancy binding on the lender.[5]

1.2 Where the tenancy is not binding on the lender

Court orders

Where the tenancy does not bind the lender (i.e. none of the circumstances set out above apply) the lender is not obliged to let the tenant remain in occupation until the expiry of their contract (tenancy agreement). Any eviction order that the lender obtains in proceedings against the borrower will be enforceable against the tenant.

Action against the landlord

Landlords who default on their mortgage payments and whose tenants lose their home as a result of possession action by lenders will be in breach of their contracts with their tenants. That a landlord may have rented a property without permission, would not affect the position of the tenants who have been renting in this respect. It is open to tenants to bring a civil claim for compensation against their landlords based on breach of an implied term in the tenancy that the landlord will not "derogate from the grant of the tenancy", i.e. act in such a way as to fundamentally undermine the existence of the tenancy. However, if the landlord is in a severe financial situation seeking compensation may be of limited benefit to the tenant.

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3 CML response, *Mortgage Remedies (Possession and Sale) Review,* January 2009

4 *Britannia Building Society v Earl* [1990] 2 All ER 469

5 *Nigar & Nigar v Mann* (1998); *Taylor v Ellis* (1960) 1 All ER 594

Section 4 of this paper outlines the protection afforded to tenants where the tenancy is not binding on the lender under the *Mortgage Repossessions (Protection of Tenants etc.) Act 2010.* Note that the Act does not prevent the lender from seeking repossession.

2. Pressure for Change 2009

During the course of 2009, several bodies recommended that action be taken to protect private tenants where their landlords default on their mortgage and repossession proceedings are brought. In addition, 126 MPs signed EDM 1154 tabled by Sally Keeble during the 2008-09 Parliamentary Session which stated:

> That this House recognises that tenants in the private rented sector risk losing their homes through repossession when landlords default on mortgages; notes that many tenants are evicted with little or no notice, sometimes only finding out when the bailiff arrives on their doorstep; further notes that many of these tenants could be at risk of homelessness through no fault of their own; and calls on the Government to take urgent action to avert a potential crisis by giving courts the discretion to defer possession and allow tenants sufficient time to find another home.

2.1 Communities and Local Government Select Committee

In February 2009 the Communities and Local Government Select Committee published the results of its enquiry into Housing and the Credit Crunch which discussed the issue of repossession of privately rented properties.

The report highlighted the uncertain extent of the problem within the wider housing market crisis:

> There was no consensus amongst the written submissions we received about the rate of repossession of privately rented properties. Crisis states "the number of buy-to-let landlords being repossessed in the first half of 2008 is double that of the first half of last year". Tom Parkinson, an individual who was the victim of just this problem, suggests in evidence to us that "anecdotal evidence from a local estate agent concurs that buy-to-let properties are being repossessed at a vastly disproportionate rate". The National Landlords Association disagrees, stating "figures from the Council of Mortgage Lenders indicate that currently only 1.1% of buy-to-let mortgages are in arrears of more than 3 months (compared to 1.33% in the wider market). The rate of repossessions is the same as for owner-occupied property: 0.16%".[6]

The limited protection afforded to most tenants in this situation was raised by several respondents. In written evidence to the Committee, Citizens' Advice said:

> In these circumstances, the tenant, who may have an unblemished rent account, is often not entitled to even the limited protection which an assured shorthold tenancy normally offers – i.e. two months' notice followed by a possession order through the accelerated possession route. Instead, the rights of the lender to repossess the property normally override those of the tenant,

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6 Communities and Local Government Committee, *Housing and the Credit Crunch*, HC 101 2008-09, para 91

> who, as "occupier", is only entitled to receive notification of the possession proceedings and eviction date.[7]

In making a recommendation on this issue, the Committee argued that more consideration should be given to the situation of tenants, stating:

> We welcome consideration being given by the Ministry of Justice to extending the period of notice a lender is obliged to give a tenant that their home is at risk of repossession. We recommend that the Government also produce guidance stipulating that lenders repossessing properties where there is a sitting tenant make arrangements for the professional management of the property for a minimum of six months after repossession or until the end of the contractual tenancy period if sooner.[8]

2.2 A private matter?

In March 2009 Crisis, Citizens Advice, Shelter and the Chartered Institute of Housing jointly published A private matter?, highlighting their concerns about the problems faced by private tenants during the repossession crisis. The paper made the following recommendations:

> The Government must take urgent action to avert this potential crisis. Tenants need legal protection to ensure that they at least have a reasonable time to find somewhere else to live.
>
> - We are calling for amendments to the Administration of Justice Acts 1970 and 1973 and the Consumer Credit Act 1974 to give courts the discretion, where an outright possession order is granted and there is a tenant in occupation, to defer possession for a limited period of time, taking into account the circumstances of the tenants. The court would then have flexibility in making this decision so that it could take into account the interests of any children or vulnerable people in the household and the household's economic circumstances. The lender could appoint a receiver of rent during this time.
>
> - More needs to be done to make tenants aware of possession proceedings and their rights by ensuring a notice is sent to the property by the courts as well as the notice from the lender. Both should include information for tenants about their rights and where they can go to get further advice. To increase the chances of a tenant opening the notice, envelopes should be marked with a message such as 'your home is at risk'.[9]

2.3 Labour Government Response to the Rugg and Rhodes Review

In 2008 the Labour Government commissioned an independent review of the private rented sector by Julie Rugg and David Rhodes, the findings of which were published as The Private Rented Sector: its contribution and potential in October 2008. In May 2009 the then

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7 *Ibid.*, Ev 166

8 Communities and Local Government Committee, *Housing and the Credit Crunch*, p43

9 Crisis, Citizens Advice Bureau, Shelter and the Chartered Institute of Housing, *A private matter? Private tenants: the forgotten victims of the repossessions crisis*, March 2009, p5

Government published its response to the Rugg and Rhodes review of the private rented sector. It said:

> Since 6 April 2009, lenders taking possession proceedings must give the maximum possible notice to occupiers of the affected property. Tenants will usually get nearly two months' notice of these proceedings, a significant increase on the previous two weeks. We are looking to see what more help we can provide for tenants who are caught up in a repossession case through no fault of their own. We urge landlords and lenders to communicate with tenants so that they are given time to make alternative arrangements if their home is at risk.[10]

Subsequent to this, the Labour Government confirmed an intention to legislate "at the earliest opportunity to fill a gap in legal protection for private tenants whose landlords are repossessed to ensure that those tenants get adequate notice to vacate the property, regardless of whether their tenancy has been authorised by the landlord's lender."[11]

[10] Department for Communities and Local Government, *The private rented sector: professionalism and quality*, May 2009 , p26

[11] HC Deb 13 July 2009 c134W

3. Consultation on the Protection of Tenants 2009

On 5 August 2009 the Labour Government launched its consultation, Lender repossession of residential property: protection of tenants, which sought to address the problems of tenants whose landlords default on their mortgages. The consultation closed on 14 October 2009. The paper defined the Government's objective in seeking to legislate as:

> 2.9 We want to give comfort to all genuine tenants that if they are required to move due to their landlord's mortgage default, they will still have a reasonable period of notice in which to make arrangements.
>
> 2.10 The Government's objective is to enable unauthorised tenants in this situation to have two months' notice that they need to vacate the property, while causing the minimum of delay to mortgage lenders and borrowers.
>
> 2.11 It seems right for unauthorised tenants to continue to pay rent during the notice period. However, it is not intended that a new tenancy should arise between the "tenant" and the lender as a consequence of the lender accepting this payment. We will consider how to provide for this, if necessary, in the legislation.[12]

The proposed changes to legislation would apply to England and Wales.

The consultation paper defined the "unauthorised tenancies" that would be the target of its proposed legislation as follows:

> **Unauthorised tenancies**
>
> It is a standard term in most owner-occupier mortgages that the borrower is prohibited from renting out the property or that the lender's consent must be sought before any such tenancy is entered into. Where a borrower lets his property in breach of this requirement or related conditions (e.g. failing to provide required information to the lender) the "tenancy agreement" will be void as against the lender. We refer to these as "unauthorised tenancies". The effect of this is that the "tenant" has no right against the lender to enforce the terms of that agreement. After repossession therefore they will have no right to remain in occupation and no right to notice of termination of the agreement. Even if the "tenants" are aware of possession proceedings and attend the court hearing, the court has very limited powers to take their situation into account.
>
> Certain tenancies will be binding on the lender. In these cases the tenant should be given notice in accordance with their tenancy agreement for the termination of their tenancy and subsequent eviction. A tenancy will usually be binding on the lender if:
>
> a) The tenancy was entered into before the mortgage agreement was made; or
>
> b) The tenancy was entered into with the consent of the lender and in full compliance with any terms specified in the mortgage deed.

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12 Department for Communities and Local Government, *Lender repossession of residential property: protection of tenants*, p16

> We are working with lenders and their representatives to increase awareness of tenancies that must be honoured in this way.
>
> Tenancies in properties supported by a Buy-to-Let (BTL) mortgage are very often binding on the lender, although some will not be if particular terms have been breached. A significant number of people have let out a property that is supported by an owner-occupier mortgage, without gaining the lender's consent to let. We are calling this a Residential-Turned-Let (RTL) mortgage. Tenancy agreements created in such a way will very rarely be binding on the lender. The result is that people who thought they had a genuine tenancy agreement with their landlord, and complied with it, can nevertheless be evicted at very short notice. In such a situation, the tenant and the lender may both be adversely affected by the actions of the borrower landlord.[13]

The consultation paper set out five proposals for proceeding; the first would involve making no legislative change. It continued:

> **Option 2** would give unauthorised tenants the right to be heard at the possession hearing, and give courts the power to postpone possession to allow unauthorised tenants who have proved their claim a decent time to move. These tenants would therefore have up to two months from the date of the possession hearing to vacate the property. Rental income may contribute to the mortgage arrears in this interim period, minus any related costs.
>
> We believe that this approach would meet the policy objective in some circumstances, but not in all. We are therefore considering additional measures that might also be put in place in order to achieve a reasonable level of security for all tenants in this position. These are:
>
> **Option 3:** To enhance the notification of the possession hearing, so that more unauthorised tenants attend and make representations at the hearing.
>
> **Option 4:** To require lenders to notify their intention to enforce possession, and provide a mechanism for unauthorised tenants to request a two-month delay.
>
> **Option 5:** To provide a mechanism for unauthorised tenants to request a two-month stay in the warrant of possession.
>
> We are currently attracted to pursuing Options 2 and 4 together, and would welcome views on this proposal.[14]

Within the framework of these options, the consultation paper then set out more precise questions discussing how these proposals might be implemented, and any associated drawbacks.

Consultation Responses

The *Mortgage Repossessions (Protection of Tenants Etc.) Bill* was announced prior to the publication of the consultation results. However, several of the key stakeholders in the housing industry published their responses to the consultation online. It was broadly agreed that legislation should be enacted, but there was less agreement on what form this legislation should take. Option 2 was strongly supported; however, while several organisations considered that it would be appropriate to implement this alongside option 4, this

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13 Ibid., p11
14 Ibid., p7

approach was questioned by others, particularly by mortgage lending associations.

Making reference to the Government options set out above, Shelter said:

> We wholeheartedly support the objective and methods proposed. Whilst the majority of tenants - particularly in buy-to-let properties - should expect to be protected from sudden eviction by lender good practice, it is important that a legal minimum exists for those tenants who are not. In particular, tenants of amateur or unprofessional landlords, or lenders who are wilfully unscrupulous or simply ignorant of their legal obligations with regard to occupiers.
>
> We agree that the best combination of legislative options is Option 2 plus Option 4. Option 2 would give courts the power to defer possession where a tenant has made themselves known. Option 4 would then create further opportunities for tenants who might not come forward in the first instance. However, we suggest some minor amendments to Option 4 to ensure it is sufficiently robust.[15]

Crisis voiced a similar view, although they were concerned that option 2 still left some tenants without protection, and put forward an amended version of option 4 to fill these perceived gaps. Their response set out two additional measures for an amended 'option 4 plus':

> 1. **Positive referral to the court:** Any dispute between the tenant and the lender would be positively referred to the court by the lender. This would encourage lenders to carefully consider applications from tenants as they will be aware that refusals will automatically go to the court for a decision. It will also remove the onus from the tenant of having to lodge a further appeal during what is a difficult and uncertain period for them.
>
> Such a referral would have the added advantage of discouraging fraudulent claims which seek to delay possession by the property owner or their associates. Claimants would be aware that any disputes would be positively referred to the court by the lender and the court would then have the power to award costs against them if their claim is found to be spurious. We are aware that fraudulent claims have been raised as a concern by some lenders and we believe that this proposal would help reduce such claims and therefore also be in the lender's interest.
>
> 2. **Right to remedy:** Up to the point of eviction, the tenant should have the right to apply to the county court for two months' notice in cases where they have not had the earlier opportunity to make an application to the lender or in cases where they have not had the opportunity to have had a refusal by the lender reviewed by the court.
>
> We envisage that this right would only be exercised in fairly unusual circumstances and so would cause very limited extra delays or cost to the lender. However, in giving the tenant a right to apply for a delay to the eviction, there should also be a

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15 Shelter, *Response to the Communities and Local Government Consultation, Lender repossession of residential property: protection of tenants*, October 2009, p3

> mechanism for review if they have not had the opportunity to exercise this right.[16]

The Council of Mortgage Lenders was supportive of a version of option 2 but was opposed to options 4 and 5 as standalone alternatives and in possible conjunction with option 2:

> We believe that a fair and proportionate solution is the introduction of option 2 with certain safeguards and limitations. This option gives the court the ability to oversee fairness between the three parties involved. This should be combined with a requirement on the court to serve notice to the tenant or occupier and a publicity campaign funded by government alerting tenants to the importance of such notices.
>
> A combination of option 2 with options 4 or 5 does not seem to us to work. They should not be combined – we cannot see why an unauthorised tenant would use option 2 if the unauthorised tenant knew that a further delay could be achieved under options 4 or 5.
>
> Option 4 seems to unfairly prejudice lenders and borrowers and we are opposed to this proposal. Option 5 has similar flaws. These options could be rogues charters and lead to deliberate delaying tactics by borrowers.
>
> Through its proposals in options 4 and 5 government seems to be attempting to resolve the issue through imposing all the burden on lenders. This is inequitable given that the position arises through borrower breach.[17]

The Building Societies Association (BSA) raised similar concerns with options 3, 4 and 5, believing they were excessively weighted against lenders:

> The BSA supports the proposal to allow tenants to make a representation at a court hearing and to allow the court to grant additional time for the tenant to vacate where appropriate.
>
> However, we do think that there are some fundamental issues to resolve before this is implemented. The most pressing issues are the implications of the lender recognising the tenancy and therefore acting as landlord as well as the increased costs involved in delaying possession.
>
> We do not believe that adequate work has been undertaken in relation to the impact of the lender as the landlord. We have serious concerns that this has not been fully assessed, nor fully understood and we believe that further work should be undertaken to ensure that lenders are not adversely affected.
>
> We do not believe that options 3, 4 or 5 are proportionate to the scale of the situation and would place far too great a responsibility upon the lender, who like the tenant have not caused this situation to arise.
>
> Whilst we appreciate the sentiment behind option 4, it is in our view a step too far, especially as we do not know the full extent of the issue. Whilst option 4 is more realistic compared to option 3 and 5, it still places far too much responsibility upon the lender.

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16 Crisis, *Lender repossession of residential property: protection of tenants: Crisis's response to the CLG consultation*, October 2009, p4-5

17 Council of Mortgage Lenders, *Lenders repossession of residential property: protection of tenants*, consultation response, 13 October 2009, p1

> The lender cannot be expected to be responsible for the tenant not acting on any correspondence sent to them.
>
> In addition, we would strongly resist option 4 on the grounds that it would fundamentally overhaul the eviction process. The comment in 3.12 of the consultation, that this change could benefit all homeowners may be true, but this should be considered carefully and as part of a much more detailed consultation.[18]

As noted above, the consultation closed on 14 October 2009. Before a summary of responses or further action was announced by the Government, Dr Brian Iddon announced his intention to introduce the *Mortgage Repossessions (Protection of Tenants Etc.) Bill*.

[18] Building Societies Association, *CLG consultation on lender repossession of residential property: protection of tenants, Response by BSA*, 13 October 2009 (now archived)

4. The Mortgage Repossessions (Protection of Tenants Etc.) Act 2010

4.1 Background

On 3 December 2009 Dr Brian Iddon, who drew first place in the Private Members' Bill ballot that year, announced that he would use this opportunity to introduce a bill to protect private tenants from losing their homes in the event of their landlord defaulting on their mortgage payments. He said:

> As soon as the announcement was made my office was overwhelmed with correspondence. This made it a very difficult decision to make as there were so many good causes I would have liked to take action on. I wanted to take forward The Protection of Tenants (Mortgage Repossession) Bill because I believe in protecting people who may lose their home through no fault of their own and, given the limited time available in this truncated Parliamentary session, I am keen to bring in a Bill that is relatively simple and that will command widespread support in the House."
>
> The Protection of Tenants (Mortgage Repossession) Bill will give private tenants rights if their landlord defaults on their mortgage and the lender takes steps to repossess the property. Currently, if a landlord is renting out a property and they have not informed the lender that it is being let, when repossession notices are sent out, they will not be addressed to the tenant. This means the tenant may be totally unaware of any repossession order until a court summons is received or the bailiffs arrive. This leaves the tenant potentially homeless.
>
> It is very difficult to collect accurate figures on this problem; for example, only if the tenant presents to the local authority as homeless would such data be registered. Government figures suggest that, in 2009, 2,000-3,000 people have been affected. However, advice agencies such as the Citizens Advice Bureau suggest the figure is much higher.
>
> Legislation in this area is urgently needed. The Government have already undertaken a consultation on this issue and I have support for the Bill from Shelter, Crisis, the Citizens Advice Bureau and the Chartered Institute of Housing. I will be campaigning very hard to ensure that my Bill passes into law before the General Election so we can start protecting private tenants as soon as possible.[19]

The Housing Minister, John Healey, indicated the Labour Government's support for this Bill:

> I welcome Brian Iddon's decision to use his Bill to close the gap in legal protections for tenants whose landlords face repossession and I will work with him closely on this important legislation. These families can end up with little or no notice that they have to move when the home they live in is taken away. I am committed to seeing the law changed to give them new protection.

[19] http://www.brianiddon.org.uk/media/091203_PPTBill.htm

> Since the downturn began, over 330,000 families have benefited from the comprehensive range of Government support available to help them avoid losing their homes - including free debt advice and legal representation in court to help with mortgage interest payments and, for the most vulnerable families, the Mortgage Rescue Scheme. Dr Iddon's Protection of Tenants Bill will offer much-needed breathing space for tenants so they don't face being thrown out onto the street and have time to find a new home.[20]

4.2 What does the Act do?

The Act does not prevent lenders from seeking to evict tenants whose landlords have defaulted on their mortgages. It protects those tenants whose tenancies are not binding on their landlord's lender, (defined by the Act as 'unauthorised tenants') by giving them the opportunity to request a delay of the date of possession of up to two months.

The unauthorised tenant may make a request to the lender and if the lender refuses, or does not respond to the request, the tenant can make an application to the court. Applications can be made at the initial possession hearing, or, if that opportunity is missed, when the lender seeks to enforce a possession order. Occupiers are already notified of possession proceedings and the Act requires the lender to notify the occupier if, and when, they intend to enforce the possession by seeking a warrant of possession.

The Act:

- gives unauthorised tenants the right to be heard at a possession hearing;
- gives the court the power to delay the date for delivery of possession for up to two months, on application by the tenant;
- requires the lender to give notice, at the property, of the proposed enforcement of the possession order. (This requirement applies to all residential properties subject to possessions proceedings, it is not restricted to 'unauthorised' tenancies);
- gives lenders the right to dispute tenancy claims;
- gives lenders the right to receive income from the tenant during the intervening period before possession;
- gives tenants the right to request that the lender delay the possession for up to two months, with a right to apply to the court upon refusal; and
- gives courts the power to delay an order for enforcement of possession (i.e. to stay or suspend the execution of a possession order) for up to two months, on application by the tenant (provided that the tenant has asked the lender to undertake not to enforce the order for two months and such undertaking has not been given).

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20 Ibid.

Full guidance on the operation of the Mortgage Repossessions (Protection of Tenants etc.) Act 2010 was published by DCLG in October 2010.

Under the Civil Procedure Rules the lender must also send a notice to the housing department of the local authority within which the property is located explaining that a possession claim has started relating to a mortgaged residential property. The notice should be addressed to the Head of Housing (Homelessness) Service. This notice must contain the information as above, and must state the full address of the property. The provision covers all possession claims relating to mortgaged residential property, including buy-to-let.

4.3 Q&As on the 2010 Act

For ease of reference the following Q&As taken from the guidance on the Act are reproduced below:

> **How can a tenant check if their landlord has obtained the necessary consent to let?**
>
> Professional letting agents should request evidence from a landlord that the property has received consent to let from the landlord's lender. Letting agents should not market a property for letting if they have not satisfied themselves that this has been obtained. The tenant can request this assurance from their landlord.
>
> **What if the tenancy agreement pre-dates the mortgage agreement?**
>
> If a tenant was in the property before the mortgage was taken out the tenancy will usually be binding on the lender. This is a complicated area of law. Tenants who find themselves in this situation should immediately take independent legal advice from a local housing law centre.
>
> **Does the tenant always get two months delay?**
>
> Any postponement of possession must not exceed two months but it does not have to be two months, for example if the tenant feels that one month is adequate for their circumstances and there is a mutual agreement to this with the lender. The court will make the final determination if necessary. Tenants may not get any delay if the court does not allow their application.
>
> **10.4 Deposit arrangements**
>
> If the tenancy started on, or after, 6 April 2007, the landlord should have protected the deposit using the Deposit Protection Scheme. The tenant should have been notified of this by the scheme provider and informed of how to recover their deposit.
>
> The deposit belongs to the tenant and should be returned to the tenant unless the landlord can show that they have had to deduct money because of the condition of the property. The tenant can ask to be shown receipts or estimates for items that have been deducted from their deposit. The tenant should take up any issues connected with the deposit with their landlord or, if this is not possible, the deposit scheme provider. There is no role for the lender.

Can the Notice of Execution of Possession Order be served before an absolute order becomes effective?

Yes. The Notice of Execution of the Possession Order can be served so it is running concurrently with an absolute possession order. To minimise delay lenders could serve the notice before the possession order is effective. In the majority of cases therefore there would not be any additional time to add to the possession process, as the recipients of the notice will be owner-occupiers or authorised tenants, in both cases known to the lender. The only delay would occur if an unauthorised tenant made themselves known and came forward to the lender. The lender would then need to engage with the tenant as per the legislation.

How does the legislation work where there is more than one tenant?

If there are joint tenants, there would still be only one period of delay.

Compatibility with FSA Mortgage Conduct of Business (MCOB)

The Financial Services Authority (FSA) imposes a number of requirements on lenders repossessing a property which are set out in the *Mortgages and Home Finance: Conduct of Business* (MCOB) Rules. This includes the requirement that lenders must market a repossessed property as soon as possible and must obtain the best price that might reasonably be paid.

In guidance supporting this rule, the FSA recognises that a balance has to be struck between the need to sell the property as soon as possible, to reduce or remove the outstanding debt, and other factors which may prompt the delay of the sale, which may include, for example, things necessary to achieve the optimal selling price.

Whilst much will depend on the facts of each case, lenders giving tenants reasonable notice to leave the property will not necessarily conflict with the current requirements under MCOB which imply to delay a sale would be detrimental to the borrower.

What happens if a landlord hands in the keys?

It is feasible, although likely to be rare, for a landlord to hand in the keys to a property – a so called 'voluntary possession' - whilst tenants are still in occupation. Lenders are likely to still request a possession order and apply for a warrant to enforce the possession in order to be sure that they have legal vacant possession. In this instance therefore the lender will need to send the notice of execution of possession order to comply with the legislation. Any tenants will be captured this way.

What happens if a tenant is in receipt of Housing Benefit which has been paid direct to the landlord?

If the court delays possession for a tenant who is in receipt of housing benefit, which is paid directly to the landlord and the court has made an order that the rental payments must be paid to the lender, then the tenant will need to apply to their local authority to have their housing benefit/local housing allowance payments directed to the lender for the period that possession is postponed. The lender may need to accept some delay in receipt of payments whilst this is administered.

Can the tenant request another delay to possession if their landlord clears arrears and then falls into arrears again?

A landlord may receive a suspended possession order and at the same time the tenant may have requested and received a delay to possession. If the landlord complies with the terms of the suspended possession order in full then the order may fall away. If this happens quickly the tenant, despite having previously received a delay to possession, may decide to remain in the property now that the possession will not be enforced. If subsequently the landlord falls into arrears again, the lender will have to bring new proceedings and seek a new possession order. In this situation it is our view that there is nothing to prevent a tenant requesting a delay to possession again as this is a new possession process and that it would be within the jurisdiction of the court to allow this. This is ultimately a matter for the courts to decide.

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