

Dear members,

Now the dust has settled on the hearing on Wednesday, and we await the judgment, I set out my thoughts and advice on the various options that may eventuate.

My assessment of the case is that we have grounds for optimism on the interest rate point. If that is so, then there must be some cautious grounds for optimism on the early repayment point, as the argument is based on the same principles of contractual interpretation-the only reason I am more cautious about that point is that the provision regarding early payment is that this term is more commonplace in mortgages and the judge may be less inclined to rule it inconsistent with the special conditions. Anyway, as the thread says, it is all speculation, but that is my best estimate of where we are.

I now turn to the possible outcomes.

1. We win on both parts of the case. Happy days. WB would then appeal. We have the funds to meet this appeal. I would act for you NWNF with a fee agreed in the terms of business which WB would pay in the event of a win.
2. We lose both parts of the case. I would advise an appeal at least on the interest point, and possibly the early redemption point-we will have a fully reasoned judgment to examine, so I would advise fully after we have digested that. Again, we have the funds to cover this work.
3. We win the interest point and lose the early repayment point. I would be less likely to advise an appeal, subject to the terms of the judgment.

Scenario 3 is in my view the most likely. I recognise, as I have from the outset, that this is a prospect which will cause concern to many of you.

Mark A has already written at length about the various market-based reasons why the WB would find it difficult to enforce this term.

There are two separate routes that the WB could take, and it is important that you understand them both.

The first is the claim under 14 bullet 1, the clause argued in court.

The WB would have to bring a claim against each of you individually. This of itself is a disincentive of cost and inconvenience.

If they write to you giving notice, then you will each have a template letter that I will draft setting out your refusal to pay, and the reasons why (including an assertion that you are a consumer).

IF- you have a faultless payment history (including those who have only paid what would be the then lawfully fixed lower interest payments) then the following pieces of legislation will be deployed in your defence.

First, s.36 Administration of Justice Act 1970

36 Additional powers of court in action by mortgagee for possession of dwelling-house.

(1) Where the mortgagee¹ under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property², not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to **pay any sums due under the mortgage**³ or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

(2) The court—

(a) may adjourn the proceedings, or

¹ WB

² Including a let property-the owner does not need to be the occupier

³ See s.8 AJA 1973

8 Extension of powers of court in action by mortgagee of dwelling-house.

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

(2) A court shall not exercise by virtue of subsection (1) above the powers conferred by section 36 of the Administration of Justice Act 1970 unless it appears to the court not only that the mortgagor is likely to be able within a reasonable period to pay any amounts regarded (in accordance with subsection (1) above) as due on account of the principal sum secured, together with the interest on those amounts, but also that he is likely to be able by the end of that period to pay any further amounts that he would have expected to be required to pay by then on account of that sum and of interest on it if there had been no such provision as is referred to in subsection (1) above for earlier payment.

(b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may—

(i) stay or suspend execution of the judgment or order, or

(ii) postpone the date for delivery of possession, for such period or periods as the court thinks reasonable.

Put simply, even if WB tried to exercise the power of accelerated repayment, so long as there is no default event otherwise, the Court would ignore the power to call the mortgage in, and only find you were in default if the normal instalments were not paid up to date. Basically, you will be protected from possession being ordered if the only ground they are pleading is the 14.1 clause allowing repayment by a month's notice. This was the issue before the Court.

The basic message is, even if WB wins that point they will have no chance of getting possession if you are up to date.

The second method they could look at has not been argued in court by either side, as it was not threatened by WB. It is the statutory power of sale referred to in paragraph 15 of the booklet.

101 Powers incident to estate or interest of mortgagee.

(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

*(i) A power, **when the mortgage money has become due**, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby.*

This power to sell is exercisable the day after the mortgage was executed. The WB could sell the property at the best price but at a time of its choosing, give good title to the buyer, pay off the loan, and give you the balance. They would argue that you have agreed to them doing this by agreeing the terms.

Remarkably, there is very little law on how this section is to be applied, and certainly none on how it is to be applied in the absence of default. That is because in modern times it has never been done by a regulated lender in respect of a dwelling. Indeed, the CML Guidance on BTL possessions assumes that the case will be one of arrears or other default.

This is a course which I think the WB is highly unlikely to pursue.

- Unprecedented for a regulated lender
- Sales would be subject to the existing tenancies, and therefore not with VP.
- Liable to challenge as inconsistent with the special conditions

Costs.

Saqib has written about this earlier. The judge will have to decide what proportion of the costs should be met by each side dependent on the outcome. I suggest we defer discussion about my fees until then, and until you have been able to digest what I have written here.