



LegalMortgage Information Sheet

Section 36 Administration of Justice Act 1970

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

(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property...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 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
- (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.

(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.

(4) The court may from time to time vary or revoke any condition imposed by virtue of this section

(5)/(6)...

What is it for?

The court only has limited general powers to adjourn the hearing of a possession claim. It has an inherent jurisdiction to adjourn to enable a mortgagor to pay off the mortgage in full (for e.g. on proof of refinancing or sale), and it has general powers of case management, including the power to adjourn a hearing ([CPR 3.1\(2\)\(b\)](#)) but the power can only be exercised judicially for the purpose of furthering the overriding objective ([CPR 1.1](#)) (for e.g. if there have been procedural issues on service of court documents, or where a party is unable to attend for medical reasons).

[Section 36](#) supplements these by giving the court a fairly extensive range of statutory powers to adjourn proceedings, suspend an order for possession, stay the execution of an order, or postpone the date for delivery of possession, for such period, and subject to such conditions, as the court thinks fit. In practice, it is one of the most frequently used statutory powers available to the court and is in regular use in the county courts.

Section 36 - some initial points to bear in mind

It can only be used in a claim by a mortgagee for possession of land which consists of or includes a dwelling-house. It cannot be used where the lender is exercising a power of sale only (*Ropaigealach v Barclays Bank Plc* [2000] QB 263; *Horsham Properties Group Ltd v Clark* [2009] 1 WLR 1255) or where the premises only comprise business premises.

There is no requirement that the mortgagor has to be in occupation, so it can apply to buy-to-let mortgages (note that neither [MCOB](#) or the [Pre-Action Protocol](#) apply to buy-to-let mortgages). Unauthorised tenants are afforded separate statutory protection under the [Mortgage Repossessions \(Protection of Tenants etc\) Act 2010](#).

It is not limited to suspending an order for possession or staying execution of an order on terms as to payment. The court can impose conditions to remedy other defaults.

Where the court is considering exercising its powers, it has to be satisfied that the mortgagor will pay or remedy a default, not someone else.

The powers do not apply to an agreement which is regulated under the [Consumer Credit Act 1974](#). The court has a separate statutory power to make a time order under [s 129 Consumer Credit Act 1974](#).

[Section 36](#) was extended by [section 8 of the Administration of Justice Act 1973](#):

Section 8 Administration of Justice Act 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 mortgagee under such a mortgage and the mortgagor, the mortgagor is entitled or is to be permitted to pay the principal sum 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 the purposes of section 36 of the Administration of Justice Act 1970 (under which a court has power to delay giving a 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 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 provision as is referred to in subsection (1) above for earlier payment.

Section 36 and Section 8 explained

[Section 36](#) was intended to give a mortgagor of a dwelling-house who had fallen into temporary arrears with instalments a reasonable time to catch up. But since most mortgages had the effect of rendering the whole sum due on default, as enacted, the expression 'any sums due under the mortgage' in [s 36\(1\)](#) had the effect of confining the operation of [s 36](#) to relatively few cases in which the mortgagor was reasonably likely to pay off the whole of the sums due under the mortgage (*Halifax Building Society v Clark* [1973] 1 Ch 307).

The problem was remedied by [s 8](#) so that the court may treat as the 'sums due under the mortgage' only those sums which the mortgagor would have expected to be required to pay if there had been no provision for earlier payment.

In order to achieve this, [s 8](#) applies where:

- (a) the mortgagor is entitled or permitted either (i) to pay the principal sum by instalments or (ii) to defer payment of it in whole or part
- (b) provision is made for earlier payment in the event of default by the mortgagor or demand by the mortgagee or otherwise

Whether or not the mortgagor is entitled or permitted to pay by instalments or defer payment etc is a question of construction of the mortgage (loan agreement, mortgage deed and mortgage conditions)

A typical residential term loan payable by monthly instalments is clearly within the section, so [s 36](#) applies.

Deferment means to defer payment after it has become due. In other words [s 8](#) applies where there is an existing liability to pay which is deferred by the mortgage (e.g. Bank of Scotland v Grimes [1985] QB 1179). It does not apply where the mortgage secures a facility which is repayable on demand (e.g. an overdraft) because there can be no agreement to defer payment until it has become due, and it only becomes due following demand (Habib Bank v Tailor [1982] 1 WLR 1218). The distinction is helpfully reviewed in Royal Bank of Scotland v Miller [2002] QB 255.

Do they apply to all-monies charges?

All-monies charges (or mortgages) secure not just specific loans, but all sums that the mortgagor may owe from time to time. A common misconception is that [s 8](#) and [s 36](#) do not apply to all-monies charges. The type of security is irrelevant. They can apply to an all-monies charge provided that what is being enforced is an agreement under which the principal is payable by instalments or is otherwise deferred, hence the need to check the particular facility being enforced. If the charge simply secures a facility which only becomes repayable on demand, such as an overdraft, [s 8](#) will not apply with the consequence that all monies under the particular facility become due and [s 36](#) can only be utilised if the mortgagor can pay off the whole amount.

How do they work in practice?

In the vast majority of cases, [s 36](#) is used either to suspend an order for possession, or to stay execution of a warrant of possession, on terms as to payment.

The court should start by considering whether the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage (ie. the arrears together with the current monthly instalments). This has been called a 'jurisdictional gateway' (Bank of Scotland Plc v Zinda [2012] 1 WLR 728 at para 23 per Munby LJ). Absent proof of this, the court cannot go any further.

As to what the borrower is likely to be able to pay within a reasonable period:

Likelihood is a question of fact based on the evidence available, and the court will pay particular attention to the mortgagor's previous payment record (Halifax Plc v Okin [2007] EWCA Civ 567). The nature and extent of the evidence is a matter for the court. The Court of Appeal has sanctioned a relaxed approach to this (see Cheltenham & Gloucester Building Society v Grant (1994) 26 HLR 703)

While the court will take as its starting point for a reasonable period the remaining term of the mortgage (Cheltenham & Gloucester Plc v Norgan [1996] 1 WLR 343) this is not fixed. See the list of relevant considerations in Norgan at p 357H.

What about selling the property?

Where it is only going to be possible to pay any monies due by a sale of the property the court can exercise its power under [s 36](#), but it will still need to consider the likelihood of a sale being achieved within a reasonable period. The court will need to weigh (1) the evidence relating the sale and sale price achievable; (2) how long it is likely to take; and (3) any risk of negative equity by then. Reliable evidence from the estate agents and conveyancers explaining the position reached is helpful

As a general rule the court is unlikely to exercise its powers unless it is satisfied that the net proceeds of sale are going to be sufficient to pay off the mortgage, but note there is a separate statutory jurisdiction under [s 91\(2\) Law of Property Act 1925](#) which might permit a borrower to force an order for sale even if there is a risk of negative equity (*Palk v Mortgage Services Funding Plc* [1993] Ch 330; *Polonski v Lloyds Bank Mortgages* [1988] FLR 896). However, in those circumstances, the court is unlikely to stay possession pending an application by the borrower under [s 91\(2\)](#) (*Cheltenham & Gloucester Plc v Krausz* [1997] 1 All ER 21)

Note also [MCOB 13.3.2A\(5\)](#), that where no reasonable payment arrangement can be made, the lender should allow the borrower to remain in possession for a reasonable period to effect a sale, and [para 6.2 of the Pre-Action Protocol](#) (where borrower can demonstrate reasonable steps have been or will be taken to market the property at an appropriate price in accordance with reasonable professional advice the lender must consider postponing starting a possession claim).

What about a counterclaim?

Sometimes, a mortgagor may have a claim for damages against the mortgagee which it seeks to raise by way of defence and counterclaim to the mortgagee's claim for possession. However, a counterclaim for damages being a claim for unliquidated damages by way of set-off which equals or exceeds the amounts due is not a defence to the making of an order for possession (*National Westminster Bank Plc v Skelton* [1993] 1 WLR 72) even if the counterclaim relates to non-compliance with MCOB (*Thakker v Northern Rock Plc* [2014] EWHC 2107 (QB)) (although a defence of a liquidated set-off exceeding the mortgage debt may be an exception, but the point is undecided, see *Dunbar Assets Plc v Dorcas Holdings Ltd* [2013] EWCA Civ 864 at para [22]; *Spencer Day v Tiuta International Ltd* [2014] EWHC 4583 (Ch) at para [24]; *Thakker v Northern Rock Plc* [2014] EWHC 2107 (QB) at para [14]). However, the court may, depending on the nature of the claim, consider exercising its powers to suspend an order or stay execution pending the outcome of the claim, although this will usually require clear evidence to show that the prospects of success could, in all the circumstances, be regarded as enabling the sums due to be paid within a reasonable time (*Ashley Guarantee Plc v Zacaria* [1993] 1 WLR 62).

The exercise of discretion - what order will the court make?

If the mortgagor can get over the 'jurisdictional gateway' the court should then consider whether and on what terms to exercise its powers under [s 36\(2\)](#).

If the court is being asked to suspend an order or stay execution on terms as to payment, it will be looking to make an order that is both realistic and manageable. The 'usual' form of order is to suspend or stay on terms as to payment of the current monthly instalment (the CMI) together with a reasonable sum off the arrears (i.e. a Norgan order in Form N31). In the event of default in compliance with the terms of suspension, it is open to the mortgagee to proceed straight to enforcement, with a request for a warrant of possession (in the county court) under [CPR 83.26](#), using form [N325A](#).

Either party may apply to court for an order, or further order, under s 36, more than once, but the court will be astute to sift out vexatious applications and will usually require fresh evidence and/or a material change of circumstances (see for e.g. *Abbey National Mortgages Plc v Bernard* (1996) 71 P & CR 257).

As to adjournments, the court might adjourn in the first place (usually under its general case management powers) where it requires further evidence (or a longer appointment), but it will usually only adjourn under [s 36](#) on terms where for eg. a sale is pending (although the court could suspend or even postpone an order based around a sale).

All orders must be for a defined period. The court is unlikely to leave matters outstanding on terms that the parties may apply back.

Practice points

Lenders

Remember:

- [MCOB 13](#) (arrears and repossessions)
- [CPR 55](#)
- [Pre-Action Protocol](#)
- [N123 Checklist](#)
- Up to date statement of account

Prior to the first hearing, lenders should have produced financial information and considered any repayment proposals. In default of agreement, there is no reason why the lender/its solicitors should not ask the borrower to explain what repayment arrangements he is going to ask the court to make, enabling the lender to go prepared.

Whilst lenders will look to assess affordability in accordance with usual lending criteria, remember that in the majority of cases the issue for the court is whether the borrower is likely to be able within a reasonable period to pay (a) the arrears, and (b) the current monthly instalment.

Borrowers

Remember:

Evidence, evidence, evidence! Although the court may allow some latitude, a well-prepared borrower will go to court with reliable information about income and expenditure. If the borrower is dependent on a sale, he ought to try and produce evidence from his estate agents/conveyancers about (a) selling price, (b) timetable.

First hearings are likely to be block-listed and short. Never underestimate the practical difficulties faced by a DDJ/DJ in dealing with file after file in quick succession, so be clear and concise about what you are asking the court to do. If you wish to defend, produce a defence or a witness statement setting out the terms of the defence, be in a position to explain it. If you wish to seek a stay or suspension, produce reliable financial information.

If there are repeat applications for suspended orders or stays on execution, following a history of default, bear in mind that the court is likely to scrutinise the financial information more carefully. Since past performance is often taken as a guide to future performance, a borrower may have to come up with fresh evidence showing a change in circumstances

Last-minute applications for stays are to be avoided if at all possible. Apart from the practical problem of listing and getting an adequate hearing, it is likely to cause real practical problems for the borrower if the stay is refused.

What happens if the court makes a suspended order, the arrears are cleared, and the borrower defaults again?

Can the lender enforce the original order or does it have to start fresh proceedings?

Once the borrower falls into arrears, the lender's right to possession usually crystallises and remains exercisable notwithstanding the subsequent repayment of the arrears: *Greyhound Guarantee v Caulfield* [1981] CLY 1808; *Halifax plc v Taffs* [1999] EWCA Civ 698; *Bradford & Bingley plc v Harris*, Leeds County Court 6th November 2003.

Thus, where proceedings have been started and the court has made the usual order - possession in 28 days suspended on payment of (a) current monthly instalments and (b) £X per month off the arrears, then if the arrears are cleared but there is subsequent default, the mortgagor will be in breach of part (a) of the suspended order, and the mortgagee should be able to proceed straight to enforcement in the normal way.

Further, where mortgage possession proceedings have been started, but the arrears paid before the court makes an order, the proper course is to request the court to adjourn the proceedings generally, with permission to apply to restore on subsequent default (although in practice the court may control this by ordering that the claim be dismissed if no application is made within say 12 months).