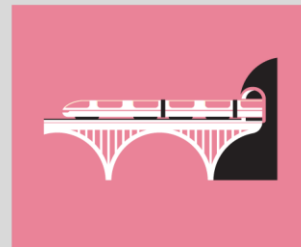
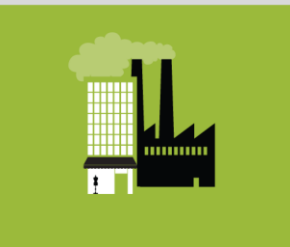


# Mortgages, receivership, and the virus

Cecily Crampin and Tricia Hemans



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# Enforcement

- Regulatory concerns
- Possession
- Selling
- Collecting income

# Regulatory concerns: to enforce or not to enforce

- FCA guidance
- S126 of the Consumer Credit Act 1974
- S140A-C of the Consumer Credit Act 1974

# Regulatory concerns: FCA guidance

- Issued on 20 March 2020
- <https://www.fca.org.uk/firms/mortgages-coronavirus-guidance-firms>
- Principle 6 & MCOB 2.5A.1R
- FCA may take Covid-19 into account when considering lender enforcement conduct
- 3-month payment holiday
- “Firms should not commence or continue repossession proceedings at this time”
- Exceptional circumstances? Eg customer request
- UK Finance: three-month moratorium on residential and buy to let possession actions from 19 March
- What next?

# Regulatory concerns: s126 of the CCA

S126: A land mortgage securing an agreement of one of the following types is enforceable on an order of the court only:

- (a) A regulated agreement
- (b) A regulated mortgage contract
- (c) A consumer credit agreement which would, but for article 60D of the RAO be a regulated agreement

# Regulatory concerns: unfair relationships

S140A-C:

The relationship between debtor and creditor is unfair because of the way in which the creditor has exercised or enforced any of this rights

Note s140A(5): does not apply to regulated mortgage contracts

# Possession: the court stay

- PD 51Z

**2. Subject to paragraph 2A**, all proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by a warrant or writ of possession are stayed for a period of 90 days from the date this Direction comes into force.

**2A.** Paragraph 2 does not apply to—

- (a) **a claim against trespassers** to which rule 55.6 applies;
- (b) an **application for an interim possession** order under Section III of Part 55, including the making of such an order, the hearing required by rule 55.25(4), and any application made under rule 55.28(1); or
- (c) an **application for case management directions which are agreed** by all the parties.

# Possession: the court stay

- *Arkin v Marshall*
- two claims for possession on residential mortgages
  - Arkin (as fixed charge receiver) v Gary Marshall
  - Gary Marshall (acting by Arkin as fixed charge receiver) v (1) Brett Marshall (2) Kim Marshall
- 1<sup>st</sup> instance: HHJ Parfit, issue whether proceedings are subject to stay by PD51Z.
- trial in a window between October 2020 and January 2021, stay meant that disclosure and witness statements couldn't be prepared.
- Held: claims were stayed, no discretion but requirement of PD51Z



# Possession: the court stay

- *Arkin v Marshall* [2020] EWCA Civ 620
- CofA: Vos Chancellor of HC, Underhill LJ and Simler LJ – appeal dismissed
  - (a) whether PD 51Z is unlawful/ultra vires:
    - *NO – power under CPRr.51.2, not inconsistent with Coronavirus Act 2020, and not incompatible with Art. 6 European Convention*
  - (b) whether PD 51Z applies to requirement to comply with case management directions in all cases:
    - Not pursued in light to amendment including paragraph 2A(c)
  - (c) power to lift the stay on a case-by-case basis
    - Yes in theory but wrong in principle to use (save in exceptional circumstances)

# Possession: the court stay

- Trespass exception: to whom does it apply?

2A(a) **a claim against trespassers** to which rule 55.6 applies

r.55.6 – service requirements for claim's issued against 'persons unknown'

r.55.1(b) - a possession claim against trespassers' means a claim for the recovery of land which the claimant alleges is **occupied only by** a person or persons who entered or remained on the land **without the consent** of a person entitled to possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not

- Application to receivers/mortgagees: claim against a trespassing occupier (but note it remains enforcement)

# Possession: as landlord

- Particularly for receivers
- Short residential tenancies
  - S81 and sched 29 of the Coronavirus Act 2020: increased notice periods for s8, s21, and similar notices to 3 months
- Commercial forfeiture
  - S82 of the Coronavirus Act 2020: no enforcement of forfeiture for rent arrears for a relevant business tenancy  
(No waiver)

# Possession: the future

- S36 Administration of Justice Act 1970: will DJs be more generous?
- More unfair relationship cases/cases based on breach of the FCA guidance?

# Sale: practicalities

- Remote viewings
- Desk-top valuations
- Availability of mortgage finance
- <https://www.gov.uk/government/news/changes-to-identity-verification-and-signing-deeds>  
PG 67A
- Difficulties enforcing a contract for sale

# Sale: the duty

Mortgagee and receiver: duty to obtain the best price reasonably obtainable

- Evidence of best price

# Sale: receivers' duty

Receiver has an active role: must consider whether to sell or not

Can he wait?

*Bell v Long* [2008] EWHC 1273 (Ch)

*Meftah v Lloyds TSB Bank Plc* [2001] 2 All ER (Comm) 74

Evidence of advice and decision making

# Sale: the future

- S91 Law of Property Act 1925?



# Collecting income

- CRAR
- Agreeing rent repayment plans or rent reductions

# Borrower insolvency

- Receivers in possession
- Vesting orders after disclaimer  
(Companies Act 2006; Insolvency Act 1986)

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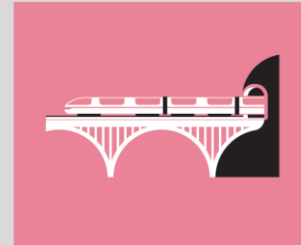
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