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New Pre Action Protocol Launched for Mortgage Possession Cases

A new set of guidelines to help resolve disputes over mortgage payments and arrears has been drawn up by the Civil Justice Council.

The pre-action protocol (PAP), drafted by the Civil Justice Council's Housing and Land committee will take effect from 19 November 2008. It is designed to encourage parties to exchange information at an early stage, to encourage early settlement of cases or where that cannot be avoided, more efficient case management. It does not alter parties existing rights and obligations.

Chaired by District Judge Robert Jordan, the Housing and Land committee was tasked with drafting the protocol which follows a series of nine existing pre-action protocols, including the 2006 Rent pre-action protocol. There has been extensive consultation since February this year, with stakeholders, regulators, other government departments and the Civil Procedure Rules Committee.

District Judge Jordan said:

"I think everyone recognises that repossession cases are a cause of great anxiety to the householder, but clearly it is important that they communicate with their mortgage lender or they risk losing their home if they are defaulting on their payments. This protocol should help by ensuring that people do talk to each other and to try and find a way forward thereby avoiding proceedings. Litigation must be seen as a last resort. The protocol does not change the courts limited powers to deal with these cases."

This PAP applies to arrears on:

- First charge residential mortgages and home purchase plans by the Financial Services Authority under the Financial Services and Markets Act 2000;
- Second charge mortgages over residential property and other secured loans regulated under the Consumer Credit Act 1974 on residential property;
- Unregulated residential mortgages.

The protocol recommends that borrowers and lenders should take all reasonable steps to discuss with each other, or their representatives, the cause of the arrears, the borrower's financial circumstances and the proposals for repayment of the arrears. For example, parties should consider whether the causes of the arrears are temporary or long term and whether the borrower may be able to pay the arrears in a reasonable time.

The court takes the view that starting a repossession claim is usually a last resort, and that such a claim should not normally be started when a settlement is still actively being explored. Discussion between the parties may include options such as:

- Extending the term of the mortgage;
- Changing the type of a mortgage;
- Deferring payment of interest due under the mortgage; or
- Capitalising the arrears.

The Master of the Rolls, Sir Anthony Clarke (who chairs the CJC) said:

“On behalf of the Civil Justice Council, I am grateful to District Judge Robert Jordan and the Housing & Land committee for all their work in drafting this pre action protocol. I believe that providing the parties co-operate with each other, it will go a long way to help to resolve disputes between lenders and borrowers.”

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