

Sale and rent back – a market study

Annexe F - Existing consumer protection

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F.1 INTRODUCTION

F.1.1 This annexe provides a detailed analysis of existing regulatory protection afforded to consumers entering into sale and rent back transactions. The following forms of regulation are described:

- Regulation by the OFT under the Consumer Credit Act 1974.
- Regulation by the OFT under the Estate Agency Act 1979.
- General consumer protection legislation.
- Consumer protection in relation to mortgage arrears and possessions.
- Consumer protection in relation to housing.

F.2 REGULATION BY THE OFT UNDER THE CONSUMER CREDIT ACT 1974

Operation of Consumer Credit Act 1974 and powers of the OFT

F.2.1 The Consumer Credit Act 1974 (CCA) regulates most forms of consumer credit transactions, other than regulated mortgage contracts and other exempt transactions.¹ It applies to mortgage contracts which are not regulated by the FSA, namely consumer credit agreements secured on land by a second or subsequent charge or where the 40 per cent residential purposes threshold is not met.

F.2.2 The CCA requires those engaged in a consumer credit business, a consumer hire business or an ancillary credit business to be licensed by the OFT.² Trading without a licence is a criminal offence and can result in a fine and/or imprisonment³ and the OFT has the power to suspend or revoke a licence in certain circumstances.⁴ The CCA also regulates the form and content of consumer credit and hire arrangements, the rights and duties of the parties to consumer credit and consumer hire agreements⁵ and the powers of courts to exercise judicial control with respect to these agreements.⁶ For example, courts have powers in certain circumstances to reopen and amend the provisions of consumer credit agreements, including where the relationship between the creditor and debtor arising from the agreement is unfair to the debtor.⁷ Lastly, the CCA controls methods of seeking business, including the

¹ CCA, sections 8 and 16(6C)(a): 'This Act does not regulate a consumer credit agreement if— (a) it is secured by a land mortgage; and (b) entering into that agreement as lender is a regulated activity for the purposes of the Financial Services and Markets Act 2000.'

² CCA, section 21.

³ CCA, sections 39 and 167.

⁴ CCA, section 32.

⁵ CCA, Parts V and VI, in particular, section 60.

⁶ CCA, Part IX.

⁷ CCA, sections 136 and 140A-140D.

advertisement of credit facilities, canvassing and the issue of quotations.⁸

Application of Consumer Credit Act 1974 to sale and rent back sector

F.2.3 A sale and rent back arrangement does not fall within the scope of the consumer credit regime. They are typically implemented by means of a sale and purchase agreement and a tenancy agreement, which are not regulated agreements for the purposes of the CCA.

F.2.4 However, if one of the original mortgage contracts held by the consumer proposing to sell their property to a sale and rent back provider is a second or subsequent charge mortgage or less than 40 per cent of the secured property is used for residential purposes, the CCA would apply to this mortgage contract. It is relevant to note that until 6 April 2008, the CCA only applied to regulated agreements where the credit provided did not exceed £25,000.⁹ It is therefore likely that many second charge mortgage contracts which fall outside the scope of FSA regulation were also not regulated until recently under the CCA as they exceeded the threshold limit of £25,000.

Sale and rent back providers' involvement in 'Ancillary credit business'

F.2.5 Sale and rent back providers may, however, be regulated by the CCA if they carry on an ancillary credit business. This is defined as 'any business in so far as it comprises or relates to' activities including debt-adjusting and debt-counselling.¹⁰

⁸ CCA, Part IV.

⁹ Consumer Credit Act 2006, section 2.

¹⁰ CCA, section 145(1).

F.2.6 Debt-adjusting is defined as:

- 'negotiating with the creditor or owner, on behalf of the debtor or hirer, terms for the discharge of a debt, or
- taking over, in return for payments by the debtor or hirer, his obligation to discharge a debt, or
- any similar activity concerned with the liquidation of a debt', in relation to debts due under consumer credit agreements or consumer hire agreements.¹¹

F.2.7 Debt-counselling is defined as 'the giving of advice to debtors or hirers about the liquidation of debts due under consumer credit agreements or consumer hire agreements'.¹²

F.2.8 These activities do not need to constitute a business in their own account. As long as the sale and rent back provider's business 'comprises or relates to' these activities, it will fall within the definition of an ancillary credit business.

F.2.9 However, it is important to note that the CCA will not apply to debt-adjusting and debt-counselling activities if the debt is a regulated mortgage contract, and the activities are regulated by FSMA.¹³ It would therefore generally not apply to any negotiations carried out by the sale and rent back provider on behalf of their client with the original lender of a first charge residential mortgage for the discharge of the debt if, indeed, any such negotiations take place. The CCA will only apply if the consumer's debt is a second or subsequent charge mortgage or less than 40 per cent of the property is used for residential purposes, or the debt is unsecured.

¹¹ CCA, section 145(5).

¹² CCA, section 145(6).

¹³ CCA, section 146(5B) and (5C).

- F.2.10 A sale and rent back provider engaging in debt-adjusting or debt-counselling without a licence commits an offence¹⁴ which can result in a fine and/or imprisonment.¹⁵ In addition, any agreement for the services of a sale and rent back provider engaging in these activities is unenforceable against the consumer if the provider is unlicensed under the CCA, unless the OFT makes an order authorising the agreement.¹⁶
- F.2.11 In order to be issued with a licence, a sale and rent back provider must apply to the OFT. The granting of a licence by the OFT does not amount to OFT endorsement or approval of the schemes offered by a sale and rent back provider, but indicates that the OFT is satisfied that the applicant is a fit person to engage in the activities covered by the licence.¹⁷ The OFT has the power to suspend or revoke the licence if it is not satisfied that the provider continues to be fit to carry on these activities.¹⁸ In addition, the OFT can require the licensee to take or desist from taking certain action if it is dissatisfied with any matter in connection with a licensee's business or conduct.¹⁹ Failure to comply with any such requirement can result in a fine of up to £50,000.²⁰
- F.2.12 The CCA regulates the form and content of advertisements which indicate that the advertiser is willing to advise on debts or engage in transactions concerned with the liquidation of debts.²¹ Failure to comply with these regulations is punishable by a fine or imprisonment or both.²²

¹⁴ CCA, section 39.

¹⁵ CCA, section 167.

¹⁶ CCA, section 148(2).

¹⁷ CCA, section 25. The OFT has provided guidance for licensees and applicants on the fitness requirements. See www.ofg.gov.uk/shared_ofg/business_leaflets/credit_licences/oft969.pdf.

¹⁸ CCA, section 32.

¹⁹ CCA, section 33A. The OFT has provided guidance on the exercise of these powers. See www.ofg.gov.uk/shared_ofg/business_leaflets/credit_licences/oft971.pdf.

²⁰ CCA, section 39A.

²¹ CCA, sections 44 (and regulations made pursuant to that section) and 151.

²² CCA, section 161 and Schedule 1.

Conclusions

F.2.13 Although entry into a sale and rent back arrangement does not fall within the scope of the consumer credit regime, some sale and rent back providers may be engaged in debt-adjusting or debt-counselling activities in relation to regulated consumer credit agreements. These activities are regulated by the CCA and may therefore be the subject of enforcement action taken by the OFT.

F.3 REGULATION BY THE OFT UNDER THE ESTATE AGENTS ACT 1979

Operation of the Estate Agents Act 1979

F.3.1 The activities of sale and rent back providers may in some circumstances be regulated by the Estate Agents Act 1979 (EAA).

F.3.2 The EAA applies to 'estate agency work',²³ which is defined as things done by any person in the course of a business, pursuant to instructions received from another person (the client) who wishes to dispose of or acquire an interest in land:

- for the purpose of, or with a view to, effecting the introduction to the client of a third person who wishes to acquire or, as the case may be, dispose of such an interest, and
- after such an introduction has been effected in the course of that business, for the purpose of securing the disposal or, as the case may be, the acquisition of that interest.

Application of the Estate Agents Act 1979 to the sale and rent back sector

F.3.3 Where a sale and rent back provider itself acquires an interest in land from a seller and does not act as an intermediary, the EAA will not apply. The statements made in advertising literature by sale and rent back providers may be relevant to this assessment.

F.3.4 Some sale and rent back providers may, however, operate as estate agents. This may be the case not only if they receive instructions from the prospective seller who is considering sale and rent back, but also if they receive instructions from a prospective property buyer to effect an introduction to the seller of the house with a view to securing a sale.

²³ EAA, section 1.

The operation of the Estate Agents Act 1979 and powers of the OFT

F.3.5 The OFT has the responsibility for enforcing the EEA.²⁴ Although there is no requirement for estate agents to be licensed, the OFT can make an order prohibiting a person from carrying out estate agency work if they are satisfied that the person is unfit to do so.²⁵ Failure without reasonable excuse to comply with such an order is an offence and could result in a fine.²⁶

F.3.6 The grounds on which a person may be unfit to carry on estate agency work include that the person:²⁷

- has committed an offence involving fraud, dishonesty, violence, or certain offences under the EAA or under an order made by the Secretary of State, such as the making of misrepresentations
- has committed discrimination in the course of estate agency work
- has failed to comply with an order or undertakings given under the Enterprise Act²⁸
- has failed to comply with certain obligations imposed by the EAA (for example, to account for interest on clients' money, to disclose certain details to a client concerning the client's prospective liabilities and to disclose information concerning the nature and extent of any personal interest the estate agent may have in the land);

²⁴ EEA, section 25.

²⁵ EEA, section 3(2). Amendments to this section made under the Consumers, Estate Agents and Redress Act 2007 entered into force on 1 October 2008.

²⁶ EEA, Section 3 (8): '(8) A person who fails without reasonable excuse to comply with an order of the OFT under this section shall be liable on conviction on indictment or on summary conviction to a fine which on summary conviction shall not exceed the statutory maximum.'

²⁷ EEA, section 3. See also the Estate Agents (Undesirable Practices) No. 2 Order 1991 and the Estate Agents (Specified Offences) No. 2 Order 1991, as amended. Amendments to the grounds on which a person may be found unfit to carry on estate agency work were included in the Consumers, Estate Agents and Redress Act 2007 applied from 1 October 2008.

²⁸ Sections 217, 218 or 219.

- has engaged in estate agency work in relation to residential property in breach of the duty to belong to a redress scheme (see below), and
- has engaged in any practice which has been declared undesirable by an order made by the Secretary of State, for example failing to pass on offers.

Forms of consumer redress

F.3.7 New requirements introduced by the Consumers, Estate Agents and Redress Act 2007 (CEARA) mean that all persons who engage in estate agency work in relation to residential properties in the UK must belong to a redress scheme approved by the OFT.²⁹ This requirement has applied from 1 October 2008.³⁰

F.3.8 The OFT has to date approved two schemes, operated by the Ombudsman for Estate Agents Company Limited and the Surveyors Ombudsman Service. The schemes provide for complaints against members of the scheme to be investigated and determined by an independent person who has the power to make a range of awards, including payment of compensation. The maximum award payable under the redress scheme that has been approved by the OFT to date is £25,000.

Conclusion

F.3.9 To the extent that sale and rent back providers engage in estate agency work, they are governed by the EAA and may be subject to enforcement action by the OFT for non-compliance with certain provisions of the EAA.

²⁹ CEARA, section 53 and Schedule 6, para 2.

³⁰ Estate Agents (Redress Scheme) Order 2008.

F.4 GENERAL CONSUMER PROTECTION REGULATION

F.4.1 Consumers who enter into sale and rent back arrangements may benefit from the protection offered by general consumer protection law.

Application of the Consumer Protection from Unfair Trading Regulations to the sale and rent back sector

F.4.2 The Consumer Protection from Unfair Trading Regulations 2008 (CPRs), which came into force on 26 May 2008, introduced a general prohibition of unfair commercial practices by traders.³¹ A 'trader' is defined as 'any person who in relation to a commercial practice is acting for purposes relating to his business, and anyone acting in the name of or on behalf of a trader'. This assessment must be made on a case by case basis, taking into account such factors as whether there is a profit-seeking motive and the number and frequency of transactions.³²

F.4.3 A commercial practice is unfair if it contravenes the requirements of professional diligence and materially distorts or is likely to materially distort the economic behaviour of the average consumer³³ with regard to the product.³⁴ In addition, a commercial practice is unfair if it is a misleading action or omission or an aggressive practice, or is a 'Schedule 1' practice which is prohibited in all circumstances.³⁵ A misleading action or omission or an aggressive practice must cause or be likely to cause an

³¹ CPR, Regulation 3.

³² See joint BERR/OFT Guidance (OFT931) at paragraph 14.22.

³³ See CPR, Regulation 2(2) – 2(6) on the definition of an average consumer. In particular paragraph 5 states that '(a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and (b) where the practice is likely to materially distort the economic behaviour only of that group, a reference to the average consumer shall be read as referring to the average member of that group'.

³⁴ CPR, Regulation 3(3).

³⁵ CPR, Regulation 3(4).

average consumer to take a transactional decision he would not otherwise have taken.

- F.4.4 There are three enforcement authorities who have a duty to enforce the regulations (although this does not mean they have to take enforcement action in every case): the OFT, Local Authority Trading Standards Services and the Department of Enterprise, Trade and Investment in Northern Ireland.³⁶ Breach of the CPRs may also be a Community Infringement under Part 8 of the Enterprise Act 2002. Where the infringement harms the collective interests of consumers, enforcers, including the OFT and FSA,³⁷ may apply to the court for an enforcement order. Enforcers use a range of tools to ensure compliance with the CPRs including education, advice and guidance, alternative systems of regulation (such as the Advertising Standards Authority), codes of conduct, civil enforcement and criminal enforcement.
- F.4.5 Engaging in an unfair commercial practice can be a criminal offence, punishable by a fine or imprisonment for up to two years or both.³⁸ Breach of an enforcement order could be contempt of court which could lead to up to two years imprisonment and/or an unlimited fine.
- F.4.6 Enforcers will normally seek to stop an infringement through consultation before applying to the court or, alternatively, may accept an undertaking not to engage in or repeat the conduct constituting an infringement.³⁹
- F.4.7 If sale and rent back providers engage in unfair commercial practices, they may be subject to enforcement action. Examples of unfair commercial practices may include:
- A commercial practice which contains either false information and is therefore untruthful or which, in its overall presentation, is deceptive

³⁶ CPR, Regulation 19.

³⁷ For a full list of enforcers, see www.berr.gov.uk/consumers/enforcement/orders/index.html

³⁸ CPR, Regulations 8 - 13.

³⁹ OFT/BERR joint guidance (OFT 931) at paragraph 11.18.

in relation to the main characteristics of the a sale and rent back product, such as its benefits and risks.⁴⁰

- A commercial practice which omits or hides material information, or provides it in a manner which is unclear, or which fails to identify its commercial intent (unless this is already apparent from the context). 'Material information' is information which the average consumer needs, according to the context, to take an informed transactional decision.⁴¹
- A commercial practice which is aggressive if, in its factual context and taking account of all its features and circumstances, it significantly impairs the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence. Account may be taken of the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product.⁴²

F.4.8 In each case, the commercial practice must have caused or have been likely to cause the consumer to take a transactional decision he would not otherwise have taken.

Conclusion

F.4.9 Sale and rent back providers may be subject to enforcement action by the OFT or other enforcers if they engage in unfair commercial practices.

Application of advertising regulation to the sale and rent back sector

F.4.10 The CPRs also apply to advertisements, sales promotions and direct marketing communications (marketing communications) which are

⁴⁰ CPR, Regulation 5.

⁴¹ CPR, Regulation 6.

⁴² CPR, Regulation 7.

prohibited if they are unfair commercial practices, misleading actions or omissions or aggressive commercial practices for the purposes of the CPRs.

F.4.11 However, consumers may also benefit from the application of other sources of regulation concerning the content of marketing communications, including self-regulatory systems. In particular, the Advertising Standards Authority (ASA), investigates complaints and cases of non-compliance with the British Code of Advertising, Sales Promotion and Direct Marketing (CAP Code)⁴³, which contains the rules for non-broadcast marketing communications, as well as the Radio and Television Advertising Standard Codes,⁴⁴ which contain the rules for broadcast advertisements. The Codes are created by the Committee of Advertising Practice (CAP). The main principles of the CAP Code are that marketing communications should be 'legal, decent, honest and truthful', 'prepared with a sense of responsibility to consumers and to society' and that marketers 'should deal fairly with consumers'.⁴⁵

F.4.12 The ASA's role is to investigate and adjudicate on complaints.⁴⁶ If a marketing communication breaches a Code, the ASA may instruct the marketer to amend or withdraw it. If they fail to do so, sanctions are applied. These include publicising the ASA's rulings, issuing 'Ad Alerts' to members of the Committee of Advertising Practice (CAP), including the media, advising them to withhold services from non-compliant marketers and requiring persistent offenders to have their marketing communications vetted by the CAP Copy Advice team.⁴⁷

⁴³ www.asa.org.uk/asa/codes/cap_code/.

⁴⁴ www.asa.org.uk/asa/codes/radio_code/ and www.asa.org.uk/asa/codes/tv_code/tv_codes/.

⁴⁵ See the CAP Code, clauses 2.1, 2.2 and 2.9.

⁴⁶ See the Non-broadcast Complaint Handling Procedures at www.asa.org.uk/NR/rdonlyres/3B1638C7-9433-4B0F-9087-CE762977CDA5/0/NonbroadcastComplaintHandlingProcedures25Jan08.pdf and the Broadcast Complaint Handling Procedures at www.asa.org.uk/NR/rdonlyres/1CC0407B-210C-488A-B5D1-71EB6A25AAC9/0/BroadcastComplaintHandlingProcedures25Jan08.pdf.

⁴⁷ See 'Sanctions' in clause 61 of the CAP Code and clause 5 of the Radio Code.

F.4.13 The ASA system is recognised as one of the 'established means' of consumer protection in relation to non-broadcast marketing communications to which the OFT should have regard before taking action itself.⁴⁸ In some cases, the ASA can refer non-complying parties to the OFT for action under the CPRs or the Business Protection from Misleading Marketing Regulations 2008, where appropriate. The OFT can seek an undertaking that the marketing will be stopped.⁴⁹ If an undertaking is not given or honoured, the OFT can seek an enforcement order to prevent its further appearance.⁵⁰

F.4.14 Ofcom also has powers conferred by the Communications Act 2003 and the Broadcasting Acts 1990 and 1996 to apply sanctions to radio and television licensees who breach the Radio and TV Advertising Standards Codes, for example, by requiring them to exclude certain advertisements, requesting a broadcast correction, imposing a fine or shortening or revoking the station's licence to broadcast.

Conclusion

F.4.15 If a sale and rent back provider publishes a misleading marketing communication, consumers may complain to the ASA. The ASA's ability to impose sanctions is reinforced by the OFT's power to require compliance with the CPRs.

Application of the Doorstep Selling Regulations to the sale and rent back sector

F.4.16 New Doorstep Selling Regulations came into force on 1 October 2008.⁵¹ The Regulations apply when consumers buy goods or services from a trader on the doorstep or in their home (or in someone else's home), at their place of work, or when they buy from a trader on an excursion the

⁴⁸ CPRs, Regulation 19(4).

⁴⁹ Enterprise Act, section 219.

⁵⁰ Enterprise Act, section 215.

⁵¹ The Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008 No. 1816.

trader has arranged away from its business premises. If a consumer changes his or her mind about a purchase above the value of £35, he or she has least seven calendar days to cancel the contract (the 'cooling-off' period). A trader must advise the consumer in writing of the right to cancel.

F.4.17 These extend the protections previously given to consumers under the Doorstep Selling Regulations 1987⁵² which are revoked.⁵³ In particular, it no longer matters whether the consumer invited a trader into his or her home or not: the new Regulations cover both solicited (invited) and unsolicited (uninvited visits or 'cold calling').

The Regulations do not, however, apply to 'excepted contracts'. These include contracts for the sale or rental of immovable property or contracts concerning other rights relating to immovable property other than (i) contracts for the construction of extensions, patios, conservatories or driveways, (ii) contracts for the supply of goods incorporated in immovable property; and (iii) contracts for the repair, refurbishment or improvement of immovable property.⁵⁴ The Regulations also do not apply to mortgages, home purchase plans or home reversions plans regulated by the Financial Services Authority (FSA) or consumer credit agreements secured on land which is regulated or exempt under the CCA.⁵⁵ An agreement by a consumer to sell his home to the sale and rent back provider (or to a third party) would fall outside the scope of the Regulations.

⁵² The Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987.

⁵³ There are transitional provisions: Reg. 4(2) and 4(3).

⁵⁴ Schedule 3 paragraph 1.

⁵⁵ Regulation 6(1)(d)(i) and (ii).

Application of the Unfair Terms in Consumer Contracts Regulations 1999 to the sale and rent back sector

F.4.18 The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) apply in relation to unfair terms in contracts concluded between a seller or a supplier⁵⁶ and a consumer.⁵⁷

F.4.19 However, a contractual term is only 'unfair' if it has not been individually negotiated and if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer.⁵⁸ An unfair term is not binding on the consumer, although the contract may continue in existence if it is capable of continuing in existence without the unfair term.⁵⁹

F.4.20 If the terms of a sale and purchase agreement or a tenancy agreement entered into by consumer and a sale and rent back provider are individually negotiated, the UTCCRs would not apply to those terms.

F.4.21 Regulation 5(2) provides that 'A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term'. The Regulations therefore most typically cover pre-formulated standard agreements which are not negotiated with a consumer, although it is always a question of fact whether a term is individually negotiated in any case. If a consumer or a solicitor acting for the consumer individually negotiates one or more terms of its agreements with the sale and rent back provider, then the consumer will not be able to claim that that term is unfair. Even if one or more terms have been individually negotiated, the consumer may still claim that

⁵⁶ Hereinafter referred to as a 'supplier'. 'Seller or supplier' is defined in Regulation 3(1) as 'any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned'.

⁵⁷ UTCCR, Regulation 4.

⁵⁸ UTCCR, Regulation 5.

⁵⁹ UTCCR, Regulation 8.

another term in the remaining part of the agreement is unfair if an overall assessment of it indicates that it is a pre-formulated standard agreement.⁶⁰

F.4.22 However, the unfairness test does not apply to terms which define the main subject matter of the contract or the adequacy of the price or remuneration, as against the goods or services supplied in exchange, in so far as these are expressed in plain intelligible language.⁶¹ There is therefore a risk that a consumer may not have recourse with respect to a claim that the price payable under a sale and purchase agreement or the rent payable, or length of tenancy, under a tenancy agreement entered into with a sale and rent back provider is unfair. It is also likely to be difficult for a consumer to claim that the main subject matter of the agreements – in particular, the sale of the consumer's original freehold or leasehold interest in the property – is unfair.

Conclusion

F.4.23 Given the limitations on the extent to which the fairness of a term may be assessed, it is likely that the UTCCRs provide limited protection for consumers entering into sale and rent back transactions.

Application of common law protections to the sale and rent back sector

F.4.24 Consumers may also rely on other, general, laws to seek redress from sale and rent back providers, for example for breach of contract or misrepresentation. In these circumstances, if a negotiated settlement cannot be reached, consumers may need to issue court proceedings and seek an order for damages to compensate them for losses incurred. Additional steps may then be needed to enforce the order against the sale and rent back provider. A court judgment may not necessarily result

⁶⁰ UTCCR, Regulation 5(3).

⁶¹ UTCCR, Regulation 6(2).

in damages being recovered, for example if the provider can no longer be traced or has become insolvent and is unable to pay.

F.4.25 In certain circumstances, tenants may also be able to argue before a court that sale and rent back providers are prevented from imposing rent increases or seeking possession under the terms of the tenancy agreement if, to do so, would be under the principle of estoppel⁶² or, possibly, breach of trust.⁶³ However, this is likely to raise complex issues of law and the outcome may not be certain and may be costly to pursue, particularly if oral assurances were given.

Consumer protection in relation to mortgages arrears and possessions

F.4.26 Many customers who consider or enter into sale and rent back transactions are in arrears on their mortgage or have had a claim for possession of their mortgaged property commenced against them. There are various forms of regulation which may afford some degree of protection to consumers in this position.

Application of FSA regulation to mortgage arrears and possessions

F.4.27 The FSA is responsible for regulating certain activities related to loans secured on land and rights in respect of other financial arrangements

⁶² The requirements of proprietary estoppel are summarized in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Ltd* [1982] QB 133 at 144: 'if A under an expectation created or encouraged by B that A shall have a certain interest in land, thereafter, on the faith of such expectation and with the knowledge of B and without objection by him, acts to his detriment in connection with such land, a court of equity will compel B to give effect to such expectation'. The interest in land in that case was an option to renew a lease. The doctrine was most recently considered by the House of Lords in *Cobbe v Yeoman's Row Management Ltd* and another, House of Lords, 30 July 2008, [2008] UKHL 55, [2008] 1 W.L.R. 1752. It is, however, an equitable remedy and, as such, at the discretion of the court.

⁶³ Under a constructive trust on the principles established in a line of cases following *Bannister v Bannister* [1948] 2 All ER 133.

relating to the acquisition or disposal of land.⁶⁴ It is empowered to make rules which apply to persons authorised to carry on such activities for the purpose of protecting the interests of consumers.⁶⁵ This rule-making power is the basis for the rules in the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB).⁶⁶

F.4.28 MCOB applies to activities carried out in relation to three types of product: regulated mortgage contracts (which include lifetime mortgages), home purchase plans and home reversion plans.⁶⁷ Lifetime mortgages and home reversion plans are considered in more detail in Annex B. Home purchase plans enable consumers to purchase their home in a way that does not involve paying interest and may be of special interest to Muslims.⁶⁸

Regulated mortgage contracts

F.4.29 A regulated mortgage contract is a contract by which a lender provides credit to an individual or trustees which is secured by a first legal mortgage on land in the United Kingdom, at least 40 per cent of which is used or intended to be used as or in connection with a dwelling by the borrower or certain relatives of the borrower.⁶⁹ Second charge

⁶⁴ Section 19 of the Financial Services and Markets Act 2000 (FSMA) contains the general prohibition on carrying out a regulated activity in the United Kingdom unless a person is authorised by the FSA (or as otherwise provided by the Act) or exempt from the general prohibition. Section 22 gives the Treasury power to prescribe by Order the classes of regulated activity and types of investment to be regulated under the Act. Schedule 2 of FSMA indicates in general terms the regulated activities which are defined more specifically in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 No. 544, as amended (RAO). See in particular, paragraphs 23 and 23A of Schedule 2 of FSMA, the latter of which was inserted by the Regulation of Financial Services (Land Transactions) Act 2005.

⁶⁵ FSMA, section 138.

⁶⁶ See <http://fsahandbook.info/FSA/html/handbook/MCOB>. This entered into effect on 31 October 2004

⁶⁷ MCOB, rule 1.2.2.

⁶⁸ A guide to home purchase plans may be found at www.moneymadeclear.fsa.gov.uk/pdfs/home_purchase_plans.pdf

⁶⁹ There is a full definition in article 61 of the RAO, referred to in MCOB 1.2.2 and glossary.

mortgages and buy-to-let mortgages are not regulated mortgage contracts.

F.4.30 It is, therefore, likely that the provisions of MCOB will apply to the original mortgage contracts held by consumers who are proposing to sell their property to a sale and rent back provider. However, it is important to note that, if the mortgage contract was entered into before the coming into force of the RAO on 31 October 2004.⁷⁰ The provisions of MCOB will not apply. In addition, MCOB does not apply to second charge mortgages.

F.4.31 Where FSA regulation applies, lenders are obliged to follow the rules on arrears and possessions set out in MCOB 13 (Arrears and repossessions: regulated mortgage contracts and home purchase plans), which contains provisions concerning the information and service a firm must provide to customers who have payment difficulties or face a sale shortfall.⁷¹

F.4.32 Where mortgage contracts were entered into before the entry into force of FSA regulation, they may be treated as if they are regulated mortgages, in which case lenders apply the requirements of the FSA. Alternatively, they may be dealt with under the Council of Mortgage Lenders' statement of practice on arrears and possessions, which is similar to the provisions of MCOB 13.⁷² Where mortgage contracts, such as second charge mortgages, are not subject to FSA regulation, they may be subject to the CCA. This is discussed above.

F.4.33 The rules on arrears and default set out in MCOB 13 are intended to amplify the principle that 'a firm must pay due regard to the interests of its customers and treat them fairly'.⁷³ As such, they contain a range of consumer protection measures, including, most importantly:

⁷⁰ Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, Article 61.

⁷¹ A 'sale shortfall' is defined as the outstanding amount due to the [home finance provider](#), under a [home finance transaction](#), following the sale of the property that is its subject.

⁷² See www.cml.org.uk/cml/policy/issues/1629.

⁷³ MCOB 13.2.1 and the FSA's High Level Standards, Principles for Business, PRIN 2.1, (Principle 6).

- A requirement⁷⁴ to deal fairly with any customer who is in arrears, has a sale shortfall or is in breach of a home purchase plan and to put in place and operate in accordance with a written policy and procedures to comply with this requirement. The written policy and procedures should include requirements to:
 - use reasonable efforts to reach an agreement with a customer over the method of repaying a payment shortfall, having regard to the desirability of agreeing an alternative to taking possession of the property
 - liaise with a third party source of advice regarding the payment shortfall, if a customer makes arrangements for this
 - adopt a reasonable approach to the time over which the payment shortfall should be repaid, establishing a payment plan which is practical in view of the customer's individual circumstances, where feasible
 - grant a customer's request to change the date on which a payment is due (provided it is within the same payment period) or the method of payment, unless it has good reason not to do so, in which case it must give written reasons for refusing the request
 - consider allowing the customer to remain in possession to effect a sale, where no reasonable payment arrangement can be made
 - repossess the property only where all other reasonable attempts to resolve the position have failed⁷⁵

⁷⁴ MCOB 13.3.1 and 13.3.2.

⁷⁵ Contravention of these requirements may be relied on as tending to show a contravention of MCOB 13.3.1.

- a requirement⁷⁶ to give customers a reasonable period of time to consider any proposals for payment that are put to them and to give them adequate information to understand the arrangements
- a requirement⁷⁷ to provide a customer who falls into arrears a range of information as soon as possible, and no later than within 15 business days of becoming aware of the fact. This includes the current FSA information sheet on mortgage arrears⁷⁸
- a requirement⁷⁹ to take certain steps before commencing action for repossession, including providing a written update of the information provided when the customer fell into arrears, ensuring the customer is informed of the need to contact the local authority regarding his or her eligibility for local authority housing and stating the action that will be taken with regard to repossession
- a requirement⁸⁰ not to put pressure on a customer through excessive telephone calls or correspondence or by contact at an unreasonable hour, and
- a requirement⁸¹ to market a repossessed property for sale as soon as possible and to obtain the best price that might reasonably be paid, taking into account factors such as market conditions and the continuing increase in the amount owed by the customer.⁸²

F.4.34 It is clear that there are measures in place under MCOB to assist customers facing payment difficulties or repossession, by ensuring that they have a reasonable opportunity to reach agreement with the lender

⁷⁶ MCOB 13.3.4.

⁷⁷ MCOB 13.4.1 and 13.4.4.

⁷⁸ MCOB 13.4.1.

⁷⁹ MCOB 13.4.5.

⁸⁰ MCOB 13.5.3.

⁸¹ MCOB 13.6.1.

⁸² The case law has repeatedly emphasised that a mortgagee 'has an unfettered discretion to sell when he likes to achieve repayment of the debt which he is owed', *Silven Properties Ltd v Royal Bank of Scotland* [2003] EWCA 1409; [2004] 4 All ER 484.

as an alternative to taking possession of the property, they have relevant information concerning their position and they are not subjected to inappropriate pressure.

F.4.35 In the event a property is repossessed, there is an obligation to obtain the best price that might reasonably be paid in the circumstances, taking into account a range of factors.

F.4.36 The latest findings of the FSA's Mortgages Effectiveness Review indicate that there are areas of non-compliance with the FSA's rules on arrears. The FSA is taking further action in respect of these areas of non-compliance, including enforcement action.⁸³

F.4.37 In addition, if a lender has not treated a customer fairly or followed the MCOB rules, a customer can also complain and, if necessary, apply to the Financial Ombudsman Service to determine the complaint.

Application of Consumer Credit Act 1974 to mortgage arrears and possessions

F.4.38 As noted above, if a consumer holds a second or subsequent charge mortgage or less than 40 per cent of their property is used for residential purposes, the CCA would apply to this mortgage contract, although prior to 6 April 2006, its application was limited to circumstances where the credit provided did not exceed £25,000.⁸⁴

F.4.39 Regulation of arrears and possession practices by the OFT stems from the requirement for lenders to be fit to hold a consumer credit licence.⁸⁵ In addition, the OFT's 1997 guidelines for lenders and brokers on non-status lending provide guidance to lenders on arrears and possession management practice. They must deal with borrowers in arrears

⁸³ See the FSA's announcement at www.fsa.gov.uk/pages/Library/Communication/PR/2008/087.shtml.

⁸⁴ See paragraph F.2.4 above.

⁸⁵ CCA, section 25. The OFT has provided guidance for licensees and applicants on the fitness requirements. See www.of.gov.uk/shared_of/business_leaflets/credit_licences/oft969.pdf.

'sympathetically and positively', notify the borrower monthly of the arrears, together with the amounts paid or unpaid and any interest or default charges, they should not seek to repossess a property except as a last resort and should not harass the borrower through excessive or intimidating correspondence or phone calls.⁸⁶ The OFT has indicated that non-compliance with these guidelines would be considered deceitful or oppressive or otherwise unfair or improper, such as to question the fitness of the licence holder.⁸⁷

F.4.40 In conclusion, where it applies, the CCA is likely to have fairly limited application to customers who are in arrears on their mortgage or face a possession claim in relation to their property. However, it provides some forms of protection to consumers in this position, by prohibiting lenders from engaging in unfair or improper conduct, and permitting the OFT to take enforcement action against lenders who do not meet the required standards of conduct.

Application of other regulation to possession claims

F.4.41 The legal framework applicable to possession claims also grants a number of powers to the courts, which may afford protection to consumers in some circumstances.

F.4.42 The Administration of Justice Acts 1970 and 1973 give the court power to stay, suspend or postpone possession as long as the borrower can pay 'any sums due' within a 'reasonable' time.⁸⁸ In practice, this means that the court can exercise its discretion to suspend possession if the borrower is able to pay both the arrears and the current instalments or that he will seek to sell the property promptly to discharge the arrears and the mortgage debt (assuming the proceeds of sale will be sufficient

⁸⁶ See www.offt.gov.uk/shared_offt/reports/consumer_credit/oft192v2.pdf, paras 46 - 48.

⁸⁷ CCA, section 25(2A)(e).

⁸⁸ Administration of Justice Act 1970, section 36 and Administration of Justice Act 1973, section 8. Section 38 of the 1970 Act provides that section 36 does not apply to a mortgage securing an agreement which is a regulated agreement under the CCA. These Acts apply to court proceedings in England, Wales and Northern Ireland only.

to redeem the mortgage). However, the court cannot grant an indefinite suspension and the discretion may not be exercised if the borrower is unable to comply with the original payment schedule and pay off the arrears by reasonable instalments (for example, the court cannot order payment of interest only).⁸⁹

F.4.43 The Administration of Justice Acts do not apply to a mortgage securing a regulated agreement under the CCA (for example, a second charge mortgage). However, the CCA itself provides that the mortgage is only enforceable by order of the court,⁹⁰ which has a wide discretion to make a 'time order' under which the borrower is given time to pay such sums as the court considers reasonable, having regard to the means of the borrower.⁹¹ The court can also make a suspended order for possession.⁹²

F.4.44 Rule 55 of the Civil Procedure Rules 1998 sets out the procedure which must be used to make a claim for recovery of possession of land in England and Wales. It is relevant to note that the Civil Justice Council has issued a consultation paper on a 'Mortgage Arrears Protocol', the purpose of which is to ensure that all reasonable steps are taken to avoid the necessity for residential mortgage lenders to make possession claims.⁹³ The draft protocol for mortgage arrears adopts many of the rules of and reflects the guidance on good practice by lenders in dealing with borrowers as set in MCOB 13. However, it is intended to provide a significant incentive to ensure possession claims are avoided because, if adopted, the Court would have the power to impose sanctions for failure to comply with the terms of the protocol.⁹⁴

⁸⁹ Cousins, *The Law of Mortgages*, 2nd edition, 2001, para 16-86.

⁹⁰ CCA, section 126.

⁹¹ CCA, section 129.

⁹² CCA, section 135.

⁹³ See www.civiljusticecouncil.gov.uk/files/mortgage-pre-action-protocol-final290208.pdf.

⁹⁴ See www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_protocol.htm.

F.5 CONSUMER PROTECTION UNDER HOUSING LAWS

The protection afforded by Assured Tenancies and Assured Shorthold Tenancies

F.5.1 Housing laws may also afford some protection to consumers who have become tenants following their entry into a sale and rent back transaction.⁹⁵

F.5.2 The Housing Act 1988 (HA 1988) created two types of assured tenancy: the assured tenancy (AT) and the assured shorthold tenancy (AST). Assured shorthold tenants generally have less security of tenure than assured tenants. The presumption in the legislation, from 28 February 1997, is that all landlords intend to create ASTs unless they state otherwise, by serving a notice to this effect on the tenant or including such a statement in the AT agreement.⁹⁶ Sale and rent back firms typically enter into AST agreements with clients who wish to rent back their property.

Security of tenure

F.5.3 Most ASTs are granted for a period of 6 or 12 months. During this time, the landlord can only recover possession by obtaining an order of the court on specified grounds, provided that he has reserved the right to do so in the AST agreement.⁹⁷ Once the fixed period of the tenancy (if any) has expired, the landlord is able to recover possession of the rented property on two months' notice without making out any grounds for possession.⁹⁸ The court, however, cannot make a possession order

⁹⁵ It is noted that the discussion in this section relates to housing laws applicable in England & Wales. Reference should be made to the Housing (Scotland) Act 1988 for comparable provisions concerning assured tenancies, short assured tenancies and protection from eviction which apply in Scotland.

⁹⁶ HA 1988, section 19A and Schedule 2A, paragraphs 1 – 3.

⁹⁷ HA 1988, section 7(6).

⁹⁸ HA 1988, section 21.

which will take effect earlier than 6 months from the start of the tenancy.⁹⁹

F.5.4 By contrast, a landlord can only seek possession against an assured tenant on a number of grounds specified in Schedule 2 of the HA 1988.¹⁰⁰ The landlord needs to apply for an order of the court and must prove that something about the tenant's conduct justifies repossession or that there is some other fair reason why the landlord needs to end the tenancy.

F.5.5 A tenant's security of tenure can also be affected if the landlord defaults on his mortgage. The majority of mortgages prohibit the renting out of property without the lender's consent. If the property is let, whether pursuant to an AST or an AT, without the lender's consent, the tenant will have no protection if the lender seeks to repossess the property.¹⁰¹ Even if the property is let pursuant to an AT or an AST, one of the grounds on which a court must order possession of a property is if the lender is entitled to exercise a power of sale conferred on him by the mortgage and requires possession of the dwelling for the purpose of disposing of it with vacant possession.¹⁰² In addition, the landlord must have given notice to the tenant before the grant of the tenancy that possession might be recovered on this ground. The court can, however, dispense with the requirement to give notice if it is just and equitable to do so. This indicates that in some circumstances, even an assured tenant whose landlord defaults on his mortgage may not have security of possession. It is nevertheless likely to be more difficult in practice for a lender to secure possession of a property subject to an AT than an AST in circumstances where the landlord defaults on the mortgage.

⁹⁹ HA 1988, section 21(5).

¹⁰⁰ HA 1988, sections 5 and 7.

¹⁰¹ *Britannia Building Society v Earl* [1990] 1 EGLR 133.

¹⁰² HA 1988, Schedule 2, Ground 2.

Protection against rent increases

- F.5.6 The HA 1988 also imposes some restrictions on landlords who wish to increase the rent on an AT or an AST agreement. These rules only apply to periodic tenancies and not to fixed term tenancies.¹⁰³ Under a fixed term tenancy, the agreed rent stands for the whole term and the landlord can only increase the rent in accordance with the provisions of the tenancy agreement.
- F.5.7 Under a periodic tenancy, landlords must not increase their rent more than once every 12 months and may only do so by serving an official rent increase notice.¹⁰⁴ However, this protection does not apply at all if the tenancy agreement contains a rent increase clause which can be construed as a 'provision' for the increase of rent.
- F.5.8 A tenant may also have recourse to the Residential Property Tribunal Service (the 'Service') if they have a dispute with their landlord about rent. A tenant with an assured periodic tenancy agreement can apply to the Service if their landlord tells them that they plan to increase the rent by serving them with the relevant notice, provided that they do so before the date on which the new rent is to take effect.¹⁰⁵ The Service must make its determination on the basis of the rent the landlord could reasonably expect to obtain in the open market if he were letting it on a new tenancy on the same terms as the present tenancy.¹⁰⁶
- F.5.9 An assured shorthold tenant can apply for the Service to determine the rent payable within the first six months of their tenancy. In this case, the Service can only make a determination if the rent payable would be significantly higher than the rent the landlord might reasonably be expected to obtain, having regard to the level of rents payable in similar

¹⁰³ A fixed term tenancy has a fixed beginning and a fixed end. A periodic tenancy does not provide any fixed date on which the tenancy is to end.

¹⁰⁴ HA 1988, section 13.

¹⁰⁵ HA 1988, section 13(4) and 14.

¹⁰⁶ HA 1988, section 14.

houses in the locality.¹⁰⁷ Thereafter an assured shorthold tenant can apply on the same grounds as an assured tenant, assuming they hold a periodic tenancy agreement.¹⁰⁸

F.5.10 Although a tenant's right to apply to the Service to review their rent affords protection in some cases against extortionate rent increases, it is unlikely that the Service would be able to take into account issues such as whether a discount on rent payable by a sale and rent back client to the landlord is appropriate or proportionate to the discount on the purchase price of the property that was payable to the landlord.

Application of the Protection from Eviction Act 1977

F.5.11 The *Protection from Eviction Act 1977* also affords protection to tenants in England and Wales against unlawful eviction and harassment. It provides that it is an offence for a person:

- To unlawfully deprive or attempt to deprive a tenant of his occupation of premises, unless he proves that he believed, and had reasonable cause to believe, that the residential occupier had ceased to reside in the premises.¹⁰⁹
- To carry out acts likely to interfere with the peace or comfort of the tenant or to persistently withdraw or withhold services reasonably required for the occupation of the premises, with the intent to cause or knowing or having reasonable cause to believe that the conduct would be likely to cause the tenant to give up the premises or refrain from exercising any right or pursuing any remedy in relation to the premises.¹¹⁰

F.5.12 In addition, it is prohibited to enforce a right to recover possession of premises held under an AST if the occupier continues to reside in them,

¹⁰⁷ HA 1988, section 22.

¹⁰⁸ HA 1988, section 14(9).

¹⁰⁹ Protection from Eviction Act 1977, section 1(2)

¹¹⁰ Protection from Eviction Act 1977, section 1(3) and (3A).

otherwise than by court proceedings.¹¹¹ These offences may be prosecuted by local authorities and are punishable by payment of a fine or imprisonment for a term not exceeding two years.¹¹²

Recourse to the Housing Ombudsman Service

F.5.13 Some tenants may have recourse to the Housing Ombudsman Service in the event that they have a complaint about shortcomings in the way their homes are managed. However, it is important to note that the Service can only deal with complaints raised against members, which are either registered social landlords or private landlords who have become voluntary members of the scheme.

Conclusion

F.5.14 Housing law may, therefore provide some protection to assured tenants in relation to their security of tenure. It may also provide some protection in relation to rent increases, depending on the initial tenancy agreement they entered into. Action may be taken by local authorities against unscrupulous landlords, but this does not provide any direct form of redress to tenants who may have been unlawfully evicted or harassed by their landlord.

¹¹¹ Protection from Eviction Act 1977, section 3.

¹¹² Protection from Eviction Act 1977, section 1(4) and 6.