



Pointmaker

SAVE 100,000 HOMES FROM REPOSSESSION

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SUMMARY

- Home repossessions in England and Wales are expected to soar during 2009 and 2010.
- If the trends of the 1990 recession are replicated, there will be over 145,000 households made homeless through repossession in 2009, with another 270,000 additional households becoming subject to a repossession order.
- Current Government proposals are unlikely to help more than a very small number of these households.
- The Government should learn the lessons of the recession of the early 1990s: then the civil courts played a far more important role in keeping people in their homes than any of the government schemes then available.
- Court guidance for dealing with repossession hearings should therefore be improved to assist those in need. This would also help to maintain the correct legal and contractual framework for the mortgage industry.
- Assuming that the arrears patterns of the early 1990s were to be repeated, such a change in court practice could lead to 100,000 homes being saved from repossession.
- These proposals will only help those households which are considered by the courts to be able to repay their arrears and their mortgages. The risk of 'moral hazard' will therefore be minimal.
- These reforms would be practical; would take account of individual circumstances; would have a negligible cost for the taxpayer; and should be supported by the mortgage industry.

GROWING REPOSSESSIONS

Figures from the Ministry of Justice¹ published on 21 November 2008 show that mortgage repossession orders in England and Wales in the year to the third quarter of 2008 have risen by 21% compared to the same period in 2007 to 87,100.

There were strong regional variations. Mortgage repossession orders to the end of the third quarter of 2008 in the Midlands were up 26% to 17,900, the North West was up 29% to 14,400 and Wales saw an even sharper rise of 34% to 5,900.

Given the problems facing the financial services industry, the current recession is considered likely to hit London hardest. Yet mortgage repossession orders in London rose by only 9% to the third quarter of 2008, against the same period in the previous year (a total of 12,000 repossession orders).

RENT REPOSSESSIONS

Rental property repossession orders have also risen – by 7% in England and Wales over the same period last year to 85,000. However, there is a higher incidence of suspension of repossession orders for mortgaged properties than for rented properties (47% to 40% respectively during this period). This indicates that a household living in a rented property is more likely to be able to be evicted immediately following a repossession order than a household living in a mortgaged property.

¹ Ministry of Justice, *Statistics on mortgage and landlord possession actions in the county courts – third quarter 2008*, 21 November 2008. Non seasonally adjusted figures are used in this report for consistency as there is no regional breakdown provided by MoJ on a seasonally adjusted basis.

London has been harder hit when it comes to landlord repossessions – these are up by 12% compared to the same period in 2007. In the first three quarters of 2008 there were 20,200 landlord repossessions in London.

MORTGAGE ARREARS

The Council of Mortgage Lenders (CML) reports that, at the end of the third quarter of 2008, there were 11,692,000 outstanding mortgages.² Of these, 168,000, or 1.44% of the total, were over three months in arrears. The number of mortgages in arrears over three months has risen by 29.6% since the beginning of 2008 to the end of the third quarter of 2008. This hints that the rise in mortgage repossession orders, which are up 21% on the latest figures, can be expected to rise further in 2009.

The Financial Services Authority (FSA) reports a similar rise (of 24%) in residential loan accounts in arrears, over the previous year.³

REPOSSESSIONS AND SALES

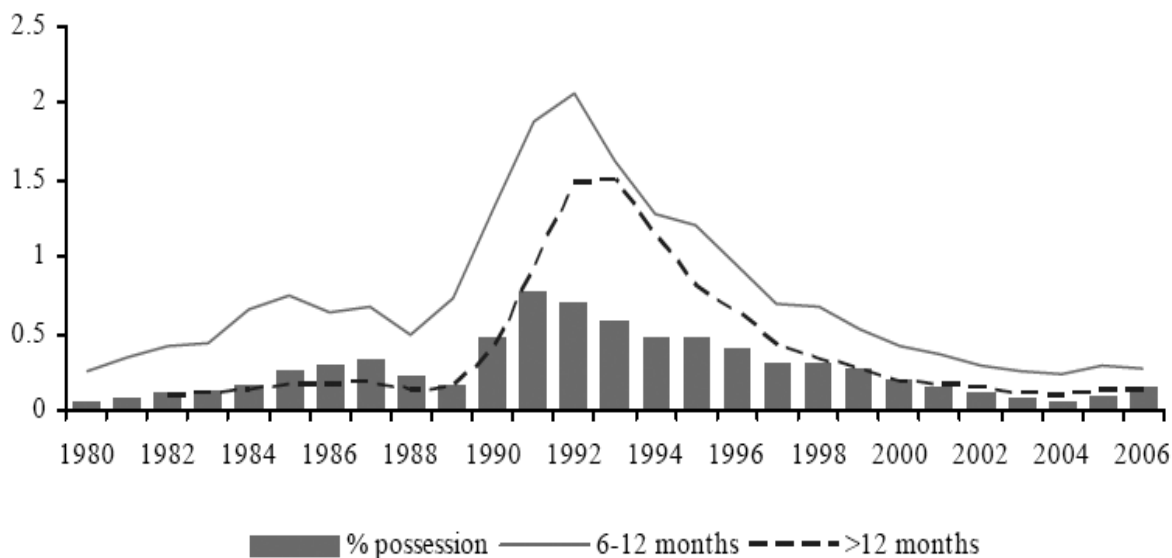
The FSA has reported that the number of households that have been repossessed and which have remained unsold has more than doubled since 2007.⁴ A build up of unsold stock is likely to depress sales prices, as lenders may be forced to accept lower prices in order to move unsold stock to repay loans.

² CML, *Arrears on mortgages, by numbers of months in arrears*, Table API, November 2008.

³ FSA, *Statistics on Mortgage Lending*, January 2009. The FSA report suggests a higher figure of 340,000 loans in arrears. Their figures are collected from a higher number of regulated loan providers than the CML and the basis for presentation of arrears and loan figures differs between the two publications. However both sets of data confirm the trend of a significantly increasing level of total residential mortgage arrears during 2008.

⁴ Ibid.

Chart 1: Arrears and possessions, 1980-2006



Source: Council of Mortgage Lenders

THE FORECAST FOR 2009

The CML has estimated that 45,000 homes will have been repossessed by lenders in 2008. This would be an increase of 71% from 2007.⁷ When repossessions peaked in 1991 there was a 38% rise in mortgage repossession orders made and a 72% rise in homes being repossessed by mortgage lenders.⁹

The FSA has reported a 92% increase in new repossessions up to the third quarter of 2008 compared to the previous year. This confirms the pattern of a sharp acceleration in repossessions which was seen during the last housing recession.¹⁰

It seems probable that 2008 was similar to 1990, being at the beginning of the rise

rather than at the peak of the repossessions trend. So, if this trend is repeated then there would be an additional 157,000 mortgage repossession orders and 77,000 repossessed homes. That would be higher than at the peak of the 1990s recession. The Council of Mortgage Lenders is currently estimating a broadly similar number, at 75,000.¹¹

Even if landlord repossessions and the number of landlord repossession orders which are suspended remained at 2008 levels, there would also be 113,000 repossession orders and 68,000 landlord repossessions in 2009.

It is therefore cautious to expect 270,000 homes to be subject to a repossession order in 2009. 145,000 additional households could be made homeless.

⁷ CML, *Housing and mortgage market forecasts: 2008*, May 2008.

⁹ Ministry of Justice, *op. cit.*

¹⁰ FSA, *Statistics on Mortgage Lending*, January 2009.

¹¹ CML market forecast, 18 December 2008.

WHAT IS BEING DONE?

1991

The three most significant features of state led intervention during the last recession were announced in December 1991. These were:

- changes to stamp duty (to stimulate house price sales);
- a national mortgage rescue scheme (to slow and/or avoid repossessions); and,
- changes in state support for mortgage interest payments (to slow and/or avoid repossessions).

The industry also introduced a number of voluntary and discretionary approaches to mortgage debt management. These included:

- a code of conduct with an industry standard period before repossession was sought;
- restructuring debt over the life of the loan;
- changing the term of loan;
- allowing reduced payments for a period of time; and,
- allowing repayment of arrears by a small additional payment over a long period of time.

2008

In 2008 the Government has attempted to introduce some superficially similar measures. These have included:

- changes to stamp duty (to stimulate house price sales);
- a national mortgage rescue scheme (to slow and/or avoid repossessions); and,

- changes in state support for mortgage interest payments (to slow and/or avoid repossessions).

The industry has also introduced some measures to help households in trouble. These include:

- a code of conduct with an industry standard period before repossession is sought;
- restructuring debt over the life of the loan;
- changing the term of loan;
- allowing reduced payments for a period of time;
- allowing repayment of arrears by a small additional payment over a long period of time; and,
- interest holiday periods for up to two years which may be partially guaranteed by the government.¹³

Stamp duty

The threshold for stamp duty for first time buyers has recently been increased from £125,000 to £175,000 until 2 September 2009.¹⁴

In comparison, in 1992, the stamp duty threshold was increased from £30,000 to £250,000 – an increase of more than eight times which took 99% of property purchases out of stamp duty.¹⁵ A similar increase today would have taken the threshold to

¹³ The Prime Minister told Parliament that households would have the right to defer interest payments for two years. The details of the scheme show, however, that this proposal is only a voluntary arrangement to be made between borrowers and lenders.

¹⁴ *The Daily Telegraph*, 2 September 2008.

¹⁵ M Stephens, J Ford, P Spencer, A Wallace, S Wilcox and P Williams, *Housing Market Recessions and Sustainable Home Ownership*, Joseph Rowntree Foundation, 2008.

£1,000,000. So the current stamp duty cut is trivial in comparison to that made in the last recession.

Whether such cuts in Stamp Duty are desirable or not, similar generosity is no longer affordable. Revenues from stamp duty were around £1 billion in 1988/9 and had fallen to £300 million by 1992/93, reflecting the fall in the housing market and the effect of the temporary stamp duty relief measure.¹⁷ HM Treasury estimates that residential stamp duty revenue for England and Wales in 2006-07 was over £6.1 billion.¹⁸

Does stamp duty relief help?

In 1991/1992, the stamp duty changes did help to bring forward sales during the stamp duty relief period.¹⁹ Stimulation of sales enabled people to sell their homes and clear debt in the earlier stages of a housing downturn.

The stamp duty reduction for 2008 does not seem to have stimulated house prices sales so far. As at the end of November 2008, RICS reported the lowest number of sales since its survey records began in 1978. House prices have continued to fall into 2009. So it seems likely that the stamp duty relief has been too limited to help people in the short term to sell their homes and get themselves out of difficulty in 2008/09.

National Mortgage Rescue Scheme

In December 1991, a national mortgage rescue scheme was announced for housing associations to purchase homes under threat of repossession. At the time the Government thought 20,000 homes would be rescued.

Analysis has suggested that due to design problems "it never took off".²⁰ Of more success seem to be schemes set up by lenders themselves and by housing associations, but these were still small in scale.

The evidence suggests that government-backed mortgage rescue schemes have little effect. For example, one scheme has operated in Wales (as well as other parts of the UK) since 2007 This enables a housing association to part-purchase equity in a house or to buy the house outright and let it back to the householder.

Wales holds seven of the top 15 hotspots for mortgage repossession. In the first three quarters of 2008 nearly 6,000 homes were subject to a repossession order in Wales, suggesting an annual total approaching 8,000 orders. Yet during 2007-2008, only 15 households at a cost of £750,000 (an average of £50,000 per house) were helped under the Welsh mortgage rescue scheme. The Government has announced an increase in funding of the Welsh mortgage scheme to £5 million with an aim to help 100 more households (assuming the same cost at £50,000 per home).²³ So this scheme if implemented last year could have been expected to have helped less than 1.26% of all homes under threat in Wales.²⁴ As the number of households in trouble increases, the percentage of homes to be helped on this basis will decrease further.

¹⁷ M Andrews, A Evans, P Koundouri, G Meen, *Residential stamp duty: time for a change*, CML, 2003.

¹⁸ HM Revenue and Customs Statistics.

¹⁹ Note that in the medium term the picture is less clear as sales fell once stamp duty relief ended. See M Stephens et al, op. cit.

²⁰ Ibid.

²³ OFT, *Sale and Rent Back – a market study*, 2008.

²⁴ To be eligible for the mortgage rescue scheme, a property has to be under threat of possession through court proceedings. There were 5,950 properties in this situation in Wales for the first three quarters of 2008, indicating on a pro rata basis, an annualised total of 7,925. If only 100 houses were helped, then this scheme, costing £5 million, was of assistance to only 1.26% of eligible properties.

In September 2008, the Government announced £200 million of funding in England to assist with up to 6,000 repossessions. Given that the average house price in England is £225,000 (over £60,000 more than in Wales alone),²⁵ it would be perhaps surprising if the efficiencies achieved in Wales could be improved by half – to the £33,000 average which the Government's own announcement has heralded.

So, even if the scheme were up and running quickly, it seems highly likely that the current mortgage rescue scheme will have as little impact as the similar scheme of the 1990s.

State support for mortgage interest payments

From 1 January 2009 certain benefit claimants with mortgage arrears of more than 13 weeks (not 9 months as previously applied) are entitled to Income Support Mortgage Interest (ISMI) payments for part or all of the mortgage interest payments.

There are three problems with ISMI:

- it applies to a very limited range of householders (for example, if a householder has more than £16,000 in assets or if a second householder works more than 15 hours a week, ISMI is not likely to be paid);
- it is often available for less than 100% of the interest payments (which means that interest arrears and capital arrears continue to accrue);
- lenders take ISMI into account but consider it to be a much more significant factor where 100% of interest payments are met.

During the last housing recession, only a small proportion of householders with mortgage arrears were eligible for state support to meet mortgage interest payments.²⁶ One study suggests that in 1995 80% of claimants received less than 100% of interest payments.²⁷ The CML has also found that lenders are not impressed with these schemes: if less than 100% of interest payments are being met by ISMI then support from lenders to those in arrears reduces from 41% to 13%.²⁸

In view of the limited availability of ISMI, the Government has also announced, on 10 December 2008, the Homeowner Mortgage Support Scheme. Here the Government provides a guarantee in relation to part of the amount of mortgage interest payments for a period of up to two years. Participation in the Mortgage Support Scheme is voluntary for both lenders and for householders. If the lenders' views in respect of partial payments for ISMI are similar in the context of the new guarantee scheme it seems likely that lenders will again be unenthusiastic to take up this scheme in practice.

HOW THE COURTS CAN HELP

During and after the last housing recession it was the court process which did most to help households in need.

There is a high degree of judicial discretion in deciding civil claims and this judicial discretion allows a court to postpone, adjourn, stay or suspend a claim for

²⁵ BBC website, house prices data 17 November 2008.

²⁶ J Ford, *The consequences of mortgage arrears and possession in a depressed housing market*, Joseph Rowntree Foundation, 1994.

²⁷ E Kempson, J Ford and D Quilgars, *The effectiveness of mortgage payment 'safety-nets'*, Joseph Rowntree Foundation, 1999.

²⁸ CML, *Managing Arrears and Possessions*, 2007.

repossession.²⁹ In the context of mortgage arrears, the courts may allow a mortgage repossession order to be suspended over a period which the court considers “reasonable” and on such conditions as to payment as the court decides.³⁰

During the last housing recession the exercise of judicial discretion for mortgage repossession orders had two consequences:

- the length of time during which a borrower could demonstrate his ability to make repayments was lengthened considerably;
- the number of repossessions orders which were suspended increased between 1990 and 1994.

The length of time for making mortgage repayments

In 1991 the courts generally considered a “reasonable period” to make payments of arrears to be two years. By 1993 the courts had tended to extend the “reasonable period” to four years. In 1996, the Court of Appeal made a landmark decision, the Norgan Case, which extended the starting point for consideration of a “reasonable period” to the whole period of the mortgage which was outstanding.³¹

This remains the current law. Therefore the maximum period, and the starting point for consideration in the exercise of judicial discretion, is the remaining period of the mortgage which is outstanding.

On 17 November 2008, the Civil Justice Council issued a Pre-Action Protocol for Possession Claims Based on Mortgage

Arrears in respect of Residential Properties.³² This had been developed in agreement with the Council of Mortgage Lenders.³³

However, this Protocol is flawed. As the 2009 Law Society’s Practice Note to solicitors states: “It does not remind lenders or inform borrowers of Court of Appeal decisions over what is a reasonable period for borrowers to pay mortgage arrears. This leaves many borrowers unnecessarily vulnerable to losing their home”.³⁴

Many defendants are often either not legally represented or do not appear at the first court hearing for mortgage repossession orders.³⁵ If non-representation or lack of information is widespread for first hearings of mortgage repossession cases, the Civil Procedure Rules should more clearly include specific requirements for information on the legal position concerning the ability of the householder to repay arrears and reschedule mortgage payments over a lengthy period, up to the term of the loan; and to require official Protocols to include references to the scope of judicial discretion which is currently available.

²⁹ Administration of Justice Acts 1970 and 1973.

³⁰ AJA 1970 section 36, as extended by the AJA 1973.

³¹ Cheltenham & Gloucester BS v. Norgan [1996] 1 ALL ER 449.

³² The Civil Justice Council is an Advisory Public Body which provides advice to the Ministry of Justice.

³³ Compliance with the Protocol is a matter which courts may take into account in the exercise of judicial discretion under the Civil Procedure Rules. The Civil Procedure Rules govern the practical process and operation and scope of decision making for the judiciary in civil cases.

³⁴ The Law Society, Mortgage Repossession Practice Note, 15 January 2009.

³⁵ A sample study on behalf of the Department of Constitutional Affairs found that over 92% of defendants in the first hearing of mortgage possession cases were unrepresented. See Professor R Moorhead and M Sefton, *Litigants in person: Unrepresented litigants in first instance proceedings*, University of Cardiff 2005.

An increase in Suspended Possession Orders

After the 1990s recession, it became clear that the way the courts acted when considering repossession orders had a significant impact on whether people were able to stay in their own homes. As one paper concluded: "The percentage of suspended orders granted by the county courts has, however, increased over the 1990s from 47% of orders made in 1990 to over 59% in the first half of 1994. This is a consequence of the growth in the percentage of defendants making representations to the court and in the changing pattern of discretionary decisions made by the district judges."³⁶

The exercise of judicial discretion also changes markedly between different courts. The data from a study by Luton Borough Council of all mortgage repossession and suspension orders in the East of England region in 2004 and 2005 demonstrates that the overall number of suspended repossession orders remained at 33% of all repossession orders, even though the total number of orders had increased by more than 43%. The number of suspended orders within each regional court area varied from 42% of all orders made in Bedford being suspended in 2005 to only 26% of orders made in Hertford in 2005 being suspended. Although it is in the nature of judicial discretion that there will be variations depending on the individual circumstances of a case, during a national housing crisis there is perhaps a need for greater consistency in those factors which are taken into account in the exercise of individual judicial discretion. Again, this can be provided through civil court guidance and procedures.

CONCLUSION

In the mid-1990 the courts exercised their judicial discretion to allow more householders to stay in their homes. As the housing market improved, the courts reduced the number of cases where it would exercise its discretion to suspend repossession orders. Accordingly, in 2008 there were the same average proportion (47%) of homes where repossession orders have been suspended as in 1991.

However, there is one significant difference between 1991 and today: the law now has the benefit of the Norgan case, which means that the courts can, if they wish, consider repayment over the remaining period of the mortgage.

Past experience suggests that the exercise of judicial discretion could prevent a large number of repossessions through the use of suspended repossession orders during the period of the current housing crisis. In particular, the change to the law in 1996 allows the courts to exercise far more discretion to householders who are in arrears than they had at the beginning of the last housing recession.

It is clearly not the correct role of elected politicians to direct the courts on how to behave. At the same time, the Ministry of Justice should not be reticent in bringing the discretionary powers that are available to the attention of the courts, particularly when this is likely to be so much more effective than the various schemes currently proposed by the Government.

³⁶ J Ford, op. cit.

How many homes could be saved?

It should be clear that these proposals are not intended to help all households that become subject to a repossession order. Rather, it is focused only on those individual households which the courts consider are in a position to repay their arrears and their mortgages, albeit over a longer time frame than originally agreed with the lender.

Nevertheless, the impact on these reforms could be substantial. If 157,000 mortgage repossession orders are made this year; and if the percentage of orders that are suspended to the levels of 1994 – that is 59% of repossession orders – then more than 30,000 homes would be saved from repossession in this year alone. Therefore, if the courts adjusted to this level now rather than in three years time, there could be more than 100,000 extra households who are not made homeless.

The courts have an important role of play in balancing family need, hardship and ability to pay based on individual circumstances and the commercial and contractual right of a defaulted lender to recover payment from its security. Their importance should not be overlooked in the current housing recession.



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