

Response to Consultation Document: Pre Action
Protocols for Possession Proceedings Based on
Mortgage Arrears in Respect of Residential
Property

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Introduction

Housing Rights Service was established in 1964 and is the leading provider of independent specialist housing advice services in Northern Ireland. We believe everyone has the right to a decent safe affordable home. Our services include:

- Providing a housing advice line
- Undertaking advocacy and legal representation on behalf of people with housing problems
- Providing online advice through our award winning website www.housingadviceNI.org and an email advice service
- Providing a specialist housing advice service within the prisons
- Delivering a skills and knowledge based training programme
- Producing information resources materials
- Supporting (In partnership with Citizens Advice and AdviceNI) generalist advice agencies to deliver high quality housing in their local communities
- Providing client based commitment to influence the development of relevant public policy and legislation

Overall, we work to achieve positive change by protecting and promoting the rights of people who are in housing need in Northern Ireland. Our policy work is based on the experience of our clients and our work actively supports current government policy commitments in the broader areas of:

- Tackling Poverty and Promoting Social Inclusion
- Promoting Access to Social Justice
- Preventing Homelessness and Meeting Housing Need
- Promoting Equality and Better Relations
- Working in Partnership with the Voluntary Sector

Core services are funded by the Housing Division of the Department of Social Development.

We welcome the opportunity to respond to the Northern Ireland Court Service Consultation on Pre Action Protocols

Context of submission

Increasing number of clients under threat of losing their home

Housing Rights Service has in the past called for the introduction in Northern Ireland of pre action protocols for lenders and landlords to follow before considering initiating proceedings for repossession; therefore we welcome the proposals published by the Court Service.¹ Statistics published by the NI Court Service have shown that there has been a steady increase in court action initiated for home possession over the past number of years. This has grown at an alarming rate in the last year – in the third quarter of 2008, there were 1006 writs and originating summons issued, a 93% increase in cases in Chancery from the same period in 2007.² The Council for Mortgage Lenders has predicted that in 2009, repossessions in the UK will be up from 45,000 to 70,000 and mortgages with more than three months arrears will rise to 500,000.³

Housing Rights Service Preventing Possession Initiative

In response to the difficulties faced by homeowners and tenants in the current economic climate, Housing Rights Service has secured funding from mainly charitable sources to initiate a project called the Preventing Possession Initiative. This initiative aims to prevent homelessness as a consequence of debt related possession action using a two pronged approach: by providing high quality advice, support and representation to those facing imminent threat of repossession; and through our policy agenda with social housing providers and lenders. The initiative is due to be formally launched in February 2009.

¹ <http://www.housingrights.org.uk/policy/tackling-housing-debt-and-affordability.html>

² http://www.courtsni.gov.uk/NR/rdonlyres/D7D01F85-EAF2-4808-B0CD-5DC77E3DF1E8/0/p_pm_pr200826.doc

Rent Arrears

Housing Rights Service notes that the proposed Pre Action Protocol covers mortgage arrears cases and does not include a protocol for rent arrears. The consultation document is silent on the issue of rent arrears and we would ask the Court Service whether consideration has been given to the introduction of a separate pre action protocol in respect of rent arrears. Housing Rights Service would highlight that such a protocol was introduced in England and Wales in 2006, and Housing Rights Service would like to see a similar measure taken in this jurisdiction.⁴

Specific Comments

1 Do you consider that a protocol for mortgage arrears cases would be helpful in this jurisdiction?

Yes, we consider that a protocol for mortgage arrears cases would be helpful in this jurisdiction given the startling statistics highlighted earlier in the submission. We believe the introduction of a pre action protocol would go some way in preventing repossessions and potential homelessness. However we would again reiterate that we would wish to see a protocol introduced in respect of rent arrears also.

2 Will the protocol have any impact on your area of business or sector-particularly in terms of benefits of costs?

There has been a 300% increase in the demand for our advice service by people seeking help in relation to housing debt and mortgage repossession.⁵ The introduction of a pre action protocol is likely to further increase the numbers of individuals seeking advice on housing debt matters to enable them to negotiate with lenders on payment proposals for mortgage arrears. Whilst this is very much welcomed, we are aware that it is likely to put further demands on our already overstretched service. However, we believe that the

³ <http://www.cml.org.uk/cml/publications/marketcommentary/109>

⁴ http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_rent.htm

⁵ <http://www.housingrights.org.uk/policy/tackling-housing-debt-and-affordability.html>

introduction of a pre action protocol could potentially have a positive impact overall in terms of costs on borrowers.

3 Do you agree with the approach the protocol takes?

We welcome the publication of the pre -action protocol; however there are a number of issues we would wish to highlight.

Section 2 of the consultation states “where either party is required to communicate and provide information to the other that reasonable steps should be taken to do so in a way which is clear, fair and not misleading.” Housing Rights Service would recommend that consideration is given to the possibility of potential language barriers and that information is provided in plain English and without technical legal jargon, or in a non legalistic format. Housing Rights Service would be willing to work in partnership with the Court Service or the Council of Mortgage Lenders to review how information is currently provided by lenders to borrowers in an effort to overcome any potential difficulties.

Section 3 of the document makes specific reference to all residential mortgages and agreements under the Consumer Credit Act 1974. The document contains a clause “where a potential claim includes a money claim and a claim for possession this protocol applies to both” and we would contend that it appears vague. It is therefore unclear from the scope of the protocol whether it applies to first charge mortgages regulated by the Financial Services Authority and if this could have possible problems for implementation once finalised. We would highlight the scope of the Pre action protocol introduced in the English Model clearly sets out the mortgages and agreements falling within its scope. We would urge clarification on this issue and would suggest that the scope of the pre action protocol is drafted in the same terms as the Pre action protocol in England and Wales to make it as clear as possible.

Section 5.2 of the document states that “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.” Housing Rights Service would recommend that guidance is given as to the meaning of “reasonable time” as practice could vary considerably.

Section 6.1 sets out the circumstances when a lender should not consider commencing possession proceedings including where a claim has been submitted to an insurer under a mortgage payment protection policy; where there is a reasonable expectation of eligibility for payment from the insurer; or where there is an ability to pay a mortgage instalment not covered by insurance. Housing Rights Service would recommend that these circumstances are widened to include where an application has been made for assistance with housing costs.

Section 7.1 deals with the issue of Alternative Dispute Resolution and highlights discussion between parties should include options such as: extending the mortgage term; changing the type of mortgage; deferring payment of interest due under the mortgage; and capitalising arrears. Housing Rights Service would recommend the inclusion of other alternative options, for example payment holiday.

Section 8 deals with the complaints to the Financial Ombudsman Service. In particular section 8.1 states “The lender should consider whether to postpone the start of possession proceedings where the borrower has made a genuine complaint to the Financial Ombudsman Service about the potential possession claim.” We would recommend that where the lender takes a decision to postpone the start of possession proceedings pending a decision from the Financial Ombudsman Service, charges that would accrue in this period of time should be suspended.

We note that section 9 deals with the issue of compliance with the protocol, but would highlight that there are no indications of sanctions for non compliance. We again would highlight the Civil Justice Council’s Consultation document on the Draft Mortgage Arrears Protocol which clearly sets out sanctions for non compliance, including an order

for costs or a direction that the lender should not be entitled to costs, or an order staying or adjourning the claim. It should be noted that the use of sanctions by the Court did not appear in the final product. We would however draw attention to the fact that the pre action protocols for rent arrears introduced in England and Wales does contain sanctions for non compliance. The protocol sets out that where the landlord fails to comply with the protocol that the court may impose an order for costs or in cases other than those brought on mandatory grounds, the court can adjourn, strike out or dismiss claims.⁶ In the case of tenants that fail to comply, the courts can take this into account when considering whether or not it is reasonable to make an order for possession.⁷ Housing Rights Service strongly recommends the inclusion of sanctions which, in our view, would enhance the effectiveness of the protocol.

4 Are there any factors in Northern Ireland which make a protocol on the English Model inappropriate in this jurisdiction?

We do not envisage any difficulties with a protocol based on the English Model being used. However, we do believe there is a need for the NI protocol to include sanctions for non compliance as stated above.

5 Do you see any practical or technical difficulties in the protocol as drafted which require amendment?

Again, the protocol needs to be made clear whether it includes first charge mortgages as regulated by the FSA in addition to those mortgages and secured loans regulated under the Consumer Credit Act 1974 as this may cause difficulties on implementation.

6 Do you have any suggestions as to additional areas which could be covered by the protocol?

We would again recommend the consideration of a separate pre -action protocol for rent arrears in Northern Ireland.

⁶ http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_rent.htm

Conclusion

We welcome the opportunity to submit a response on this consultation and would be happy to discuss this further if required.

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⁷ Ibid.