



COUNCIL of MORTGAGE
LENDERS

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**Homelessness Etc (Scotland) Act 2003
Implementation of Section 11**

Response by the Council of Mortgage Lenders

to the Scottish Executive consultation paper

30 March 2007

Introduction

1. The CML is the representative trade association for mortgage lenders. Our 161 members and 99 associates comprise banks, building societies, insurance companies, and other specialist residential mortgage lenders, who together represent around 98% of the assets of the mortgage market. In addition to lending to the private housing market, the CML members have lent over £36 billion UK-wide for new-build, repair and improvement to social housing.

2. CML Scotland welcomes the opportunity to respond to the consultation on the implementation of Section 11 of Homelessness etc (Scotland) Act 2003 (the Act).

General

3. CML Scotland is extremely disappointed that it has not been consulted by the Scottish Executive regarding this matter prior to the publication of this consultation paper. Despite the likely impact on what has been proposed on lenders they have not been included on the list of organisations who have been sent this paper and it is only through regular monitoring of the Scottish Executive website that we have picked up on this Consultation. This lack of consultation is made more disappointing given that CML Scotland is proactively involved with the Scottish Executive on other housing related matters such as the reform of the house buying and selling process and the implementation of a range of measures under the Housing (Scotland) Act 2006.

4. CML Scotland understands the desire of the Scottish Executive to achieve the homelessness targets that it has set and would fully support the need to notify local authorities of the likelihood of repossession in order that they can act to prevent homelessness either on an individual basis or by reassessing their strategic approach.

5. The way in which lenders deal with arrears and possessions on mortgages is regulated by the Financial Services Authority (FSA). The rules on arrears and possessions are in Section 13 of the Mortgage Conduct of Business Rules (MCOB13). This covers procedures adopted when handling arrears and possessions, the subsequent sale of a property in possession, the records lenders must keep, the information which must be provided to borrowers and the recovery of any outstanding debt. In general, borrowers who are in arrears are required to be treated fairly by lenders who should only seek possession of a property as a last resort.

6. Arrears and possessions on properties with mortgages taken out before FSA mortgage regulation was introduced on 31 October 2004 may be treated as if they were regulated mortgages, and lenders will apply the requirements of the FSA. Alternatively, they may be dealt with under the old CML statement of practice on arrears and possessions. This statement largely mirrors the new requirements. Lenders will advise consumers on what basis their arrears are being dealt with.

7. In terms of MCOB 13, a lender, before commencing an action for repossession, must "ensure that the customer is informed of the need to contact the local authority to establish whether the customer is eligible for local authority housing after his property is repossessed". It would appear that with the implementation of Section 11 the Scottish Executive is changing this onus and making it the duty of the lender to notify the local authority.

8. It would be interesting to know if the Scottish Executive has discussed the implementation of Section 11 with the FSA and considered if it is within its powers to amend lenders' arrears and possession procedures which are covered by MCOB 13.

9. There may be circumstances where a lender has a standard security over a residential property where the borrower is declared bankrupt or signs a trust deed and the property vests in the trustee appointed. The trustee will then become involved in the realisation of the assets although they will require to account to the lender in terms of the standard security. In such a situation, the lender would not require to serve a notice on the local authority as they would not have served any of the notices detailed in Section 11 yet there is a strong probability that the borrower will have had to leave the residential property to allow the sale to take place. It does seem surprising that the legislation does not contain any requirement for a trustee to notify the local authority.

Timing of notice

10. A lender will be required to serve notice under Section 11 when they issue:

- A calling up notice under their Standard Security.
- A default notice under their Standard Security.
- Make an application to the Court for a warrant for possession.

The experience of our members is that following the taking of any of the action listed above the actual number of cases which proceed to possession stage are relatively few. As a result there could be a lot of wasted activity and unnecessary expense incurred by local authorities where borrowers take steps to remedy the event which caused the lender to take the action which required the notice to be served. It is the view of CML Scotland that notice should only require to be served at the commencement of an action for re-possession.

11. Where a borrower has fallen into arrears on a repeated basis, it is not uncommon where a lender has previously obtained decree against the borrower for previous arrears which have been cleared for that decree to be used to obtain possession. In these circumstances, there would be no fresh Initial Writ obtained and notice would not be given again to the local authority

12. The notices served in 10 are often dealt with by solicitors acting on behalf of lenders who will charge for their costs in preparing. The Lender will in turn seek to recover these costs from the borrower and it does not seem fair and reasonable that customers in financial

difficulty should have to meet this cost when in the experience of our members it will be premature in the majority of cases. This would appear to be contrary to Section 13.3.1 of MCOB.

13. Lenders owe a duty of confidentiality to their customers and also have to comply with the terms of the Data Protection Act. Clearly Section 11 will impose a statutory duty on lenders to disclose the level of information required in the relevant notice but it will be necessary for local authority staff to understand that lenders will not be in a position to disclose any further information to them or enter into any dialogue with them unless the borrower specifically consents in writing to the lender doing so. It would perhaps be helpful if the guidance to local authority staff made this clear. For example, if a borrower was to remedy the event which led to the lender serving a calling up notice the lender would not be able to confirm this to the local authority unless the borrower specifically agreed in writing to the lender disclosing this to the local authority.

14. It is likely that some borrowers will be concerned that lenders have notified the local authority of the event concerned. To overcome this we would suggest that when making initial contact with the borrower the local authority should confirm that the lender has been complying with a statutory duty to notify them.

Duplication of notices

15. An increasingly important part of the UK mortgage market is the buy-to-let market where the lender lends to a borrower who is going to let the property out. The lender in the case of a buy to let mortgage does not necessarily know who the tenant is. As a result, where a lender takes any of the action detailed in Section 11 the notice served by the lender on the local authority will require to refer to the borrower who owns the property and not the party who occupies it. In terms of the legislation the landlord then in turn should serve a notice on the local authority but clearly this will refer to the tenant. This would appear to be a recipe for confusion so far as local authorities are concerned.

Serving of notice

16. The consultation paper envisages the notice being served by post or electronically and says that local authorities should take reasonable steps to make creditors aware of to whom the information should be sent. It also states that reasonable steps should be taken to make this information available to creditors who operate in their area. The paper also recognises that the relevant local authority area is not always clear from the postal address.

17. The majority of lenders and their agents operate centralised specialist areas dealing with arrears and possessions. This does not sit easily with the concept of local authorities having to notify only creditors who operate in their area. It would be extremely helpful if lenders were to have a central point of contact on whom notice could be served with this in turn being passed on to the relevant local authority as this would also facilitate electronic communication. It could perhaps be the case that a post code indicator could be used to identify local authority area. At the very least there should be a website where both the postal and electronic contact details for each local authority are held with this being updated as appropriate. Lenders would then be able to access this website and direct the bulk of notices to the correct local authority.

18. The paper recognises that the relevant local authority area is not always clear from the postal address. For instance, the postal address of CML Scotland is in Kilmacoll, Renfrewshire with the local authority being Inverclyde. In this case the problem

is exacerbated as Renfrewshire is also a local authority area. With centralised recovery operations this type of local knowledge is unlikely to be available. If for, instance, a lender was to serve notice on Renfrewshire Council regarding a property in Kilmacolm would they pass it on to Inverclyde or would the lender be seen as failing to comply with Section 11?

Local authority monitoring and evaluation

19. There is no detail contained in the paper on how long the local authority will retain this data and how they will destroy it. Guidance should be issued in this regard. In addition how will a local authority deal with data where a possession does not result?

20. Local authorities are urged to consider how they will use the data to identify different practices amongst creditors and to decide if they will publish information gathered. In the case of lenders our procedures in this area are subject to regulation by the FSA. As such they are monitored by the FSA and we would not expect to see any publication of any information on any lender without discussion first with the lender concerned and the FSA. This is another area where there needs to be discussion between the Scottish Executive and the FSA.

This response has been prepared by CML Scotland in conjunction with its members. Any comments or queries should in the first instance be addressed to:

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