

4. Regulated Mortgages

What Mortgages are Covered

In the case of an Irish based lender, lending to an Irish resident borrower and secured on UK property, the lending may fall entirely outside the scope of UK regulation. Even where the activity does fall within the scope of UK regulation, it is the case that most investment property mortgages are not regulated in the UK. Financial promotion in connection with the mortgage may be regulated.

A regulated mortgage contract is one where

- ❖ the loan is to an individual or trustee,
- ❖ is secured by a first legal mortgage on land and
- ❖ where at least 40% of the land is used or intended to be used for residential purposes by the borrower or certain related persons.

There are two types of regulation in the United Kingdom. The above definition of a regulated applies to both types of regulation. The first type of regulation is part of general financial services legislation and was only introduced in October 2004. The other type of regulation is under the UK Consumer Credit Act and applies to second and later mortgages.

Territorial Aspects of MCOB

The Mortgage Conduct of Business (often called MCOB) rules apply if the customer is resident in the United Kingdom or if the customer is resident in the EEA (EU plus other European states) and the activity is carried out from an establishment in the United Kingdom.

Some rules do not have territorial limitation, including the rules relating to financial promotions other than those which are directed only at persons outside the UK. Some of the rules only, apply to EEA lenders who provide services by distance sales.

Promotions by non-UK based providers parties are deemed directed only at persons outside United Kingdom, if the promotion is not referred to in, or directly accessible from, any other promotion which is made to or directed at persons in the UK by the same person. There must also be proper systems and procedures to prevent recipients and persons linked to them in the United Kingdom, from obtaining the product to which the promotion relates.

Regulated Mortgage Requirements

The mortgage conduct of business rules

(called MCOB) in the FSA Handbook apply to regulated mortgage contracts. Buy to let loans, secured on buy to let properties are not regulated in the UK.

There is a distinction between advised and non-advised sales. The lender must take steps to ensure suitability in the case of an advised sale. Steps must be taken to assess the borrower's circumstances and needs. The firm must have reasonable grounds to believe the product is the most suitable that the firm can provide. A lender must be satisfied with the borrower's ability to repay. There are provisions in connection with unfair and excessive charging. Specific disclosures are required in relation to future risks.

There are less onerous rules for non-advised sales, but there are strict conditions before the exception applies. There are obligations in relation to clarity, fairness and lack of bias. The firm must not allow a customer to buy an inappropriate product, even where there is no advice or recommendation.

There are restrictions on certain high-pressure selling techniques and cold calling. There are record keeping requirements

There must be an initial disclosure, which must be given to the customer on initial contact. There must be a pre-sale

disclosure, including a personalised "keys facts" statement setting out costs and other required information.

There are requirements to provide annual statements. There are requirements in relation to the calculation of the Annual Percentage Rate of Charge (APR).

There are limitations in respect of fees on early termination and arrears. They must be a reasonable estimate of the actual costs and losses.

Arrears and Repossession

The MCOB rules lay down obligations in relation to arrears and repossessions. A firm must deal with a customer who is in arrears or has any sales shortfall in a fair manner. There must be a written policy and procedures to ensure this happens. The written policy and procedures should attempt to procure that reasonable efforts are made to reach an agreement with the customer. The desirability of an alternative method to taking possession is emphasised.

A reasonable approach must be taken to a sales shortfall. Unless there is a good reason not to do so, a customer's request to change the date and methods of repayment should be considered under the policy. A customer must be given an explanation and

reasons, if the request is refused.

The policy should give consideration (where there is no reasonable possibility of a payment arrangement) to the customer being allowed to remain in possession to effect the sale. Repossession should only take place where reasonable attempts have been made to resolve the position and have failed. The CML has published guidance on how to comply with the requirements of MCOB.

Customers should be given a reasonable time to consider proposals put to them. The possibility of an extension of the mortgage term or type should be considered. Records of dealings with customers in relation to sales and arrears and sales shortfall must be kept. Prescribed information must be retained.

Procedure on Enforcement

Where a customer falls into arrears on a regulated mortgage contract, he or she must be given the current FSA Information Sheet on mortgage arrears together with details of payments, arrears, interest, charges and fees. They must be given written statements with the requisite information

There are restrictions on contacting and putting unfair pressure on customers.

Excessive contact and contact at unreasonable hours is prohibited. Unreasonable hours will generally fall between 8 a.m. and 9 p.m.. Firms must also have regard to the customer's individual working patterns in relation to what constitutes reasonable hours.

Documents which put unfair pressure on the customer, will include use of documents which resemble a court summons or are intended to make the customer believe they might have the authority of the court.

If a property is repossessed it should be properly marketed as soon as possible at the best price which might reasonably be available, taking account of such factors as market conditions, as well as the continuing increase in the amount owed by the customer.

The rules recognise that a balance must be struck between the need to sell the property as soon as possible and the need to remove the outstanding debt.

If the sale proceeds are less than the amount due under the regulated mortgage contract, the customer must be informed in a durable medium of the sales shortfall. If it is intended to recover the shortfall, this intention must be notified. The notification must take place within six years of the sale.

Regulation under UK Consumer Credit Act

The rest of this chapter deals with the regulation of mortgages under the UK Consumer Credit Act. This Act differs significantly to the equivalent Irish Act.

The UK Consumer Credit Act will not generally apply to lending by an Irish based lender to an Irish based borrower in Ireland. Even where there is sufficient connections to the UK so as to come within the scope of the legislation, the Consumer Credit Act has limited application to buy to let mortgage lending.

Residential Investment Property Mortgages are not usually affected by regulation either under UK Financial Services legislation or under UK Consumer Credit Act. However, there are some situations where regulation can apply, in which event the lender's rights are significantly restricted.

The Consumer Credit Act does not regulate loan agreements relating to investment properties, where the loan is secured over the investment property itself. The Consumer Credit Act does not apply to a first mortgage over an owner occupier property. Such properties are regulated under Financial Services legislation. However, the Consumer Credit Act does regulate a buy to let loan, secured as a second charge on an owner occupied

property in the UK.

If the loan is secured as a second charge on a buy to let property and the borrower or connected person intends to occupy at least 40% of the property at some stage, the loan may be regulated under the Consumer Credit Act, unless otherwise exempt. Otherwise the agreement is unregulated.

If a property is a holiday home occupied by the owner a few weeks a year, and let out for the rest of the year, Consumer Credit Act regulation may apply, if there was an intention by the owner to occupy the property as the time of the loan. The first charge on the property would be a regulated mortgage contract. A second mortgage would be subject to the Consumer Credit Act, unless it qualifies for certain other exemptions.

Regulated Loans

If a borrower secures a buy to let loan on his home in the UK, this first charge will be a regulated mortgage contract. If it is secured by a second charge, it will come within the scope of the Consumer Credit Act, unless otherwise exempt.

The Office of Fair Trading regulates second charges under the Consumer Credit Act. Lenders and brokers must hold a consumer

credit licence, unless they qualify for certain exemptions.

All advertising and promotion material must comply with Consumer Credit Advertising Regulations. There are restrictions on cold calling and telephone home visits. Contract documentation must comply with certain specific requirements. Disclosure of certain information is required. There are certain rights in relation to early settlement.

If there are arrears, the OFT Guidance requires that lenders follow certain procedures. Arrears cases must be handled sympathetically. There are requirements regarding monitoring arrears. Borrowers should be notified in writing as soon as possible of arrears and given certain details. Borrowers and lenders must act reasonably and fairly. Possession should be a last resort. The pre-Action protocol for possession claims introduced in October 2008, broadly accords with the OFT Guidance.

The Consumer Credit Act provides that a regulated agreement is enforceable by a court order only. In contrast, other lenders can take peaceable possession without a court order.

Second charge mortgagors under the Consumer Credit Act can apply to court to have a loan agreement altered, because it is

unfair. The court may alter the terms of the agreement if they are found to be unfair. The court may do this, for example, by reducing the interest on the loan and / or allowing the borrower to pay on fair terms.

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This is an extract from our "Legal Guide to the Management and Enforcement of Security in England and Wales for Irish Lenders (2009). The Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances. It should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances. While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in it. The reader should rely only on specific legal or taxation advice. This extract is based on the law as of 1st August 2009.

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