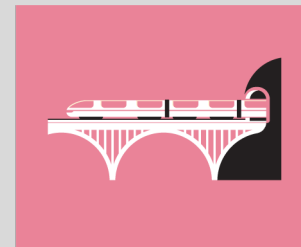
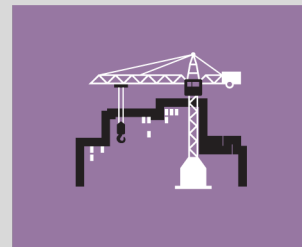
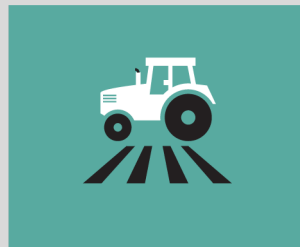
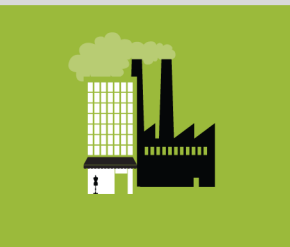


Mortgages, regulation, and litigation

Sub title



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What this talk will cover

- Current FCA guidance
- A walk around the legislation
- Lack of authorisation under FSMA 2000
- Regulated activities relevant to mortgages
- Current COVID-19 stay
- S126 of the Consumer Credit Act 1974
- Unfair relationships under the Consumer Credit Act 1974



FCA Guidance

- <https://www.fca.org.uk/publications/finalised-guidance/mortgages-and-coronavirus-updated-guidance-firms>
- “Firms should not commence or continue repossession proceedings against customers before 31 October 2020”
- “Commencing or continuing repossession proceedings at this time is very likely to contravene Principle 6 and MCOB 2.5A.1R”
- Exceptional circumstances: customer request that proceedings continue
- The Civil Procedure (Amendment No. 2) (Coronavirus) Rules 2020
- Part 55 stay until 22 August 2020





A walk around the legislation

- Financial Services and Markets Act 2000
- S19: the general prohibition: no person may carry on a regulated activity unless he is an authorised person or an exempt person
- Regulated activities are in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO)
- S23: a person who contravenes the general prohibition is guilty of an offence



Authorisation

- S31(1)(a): a person who has Part 4A permission to carry out one or more regulated activities is authorised
- S38: exemption orders





Agreements made in contravention of the prohibition

- S26: An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party
- Entitled to recover any money or property paid or transferred under the agreement
- Entitled to compensation for any loss sustained as a result of having parted with it

When it is just and equitable to permit enforcement

- S28: enforceability on the order of the court
- “If the court is satisfied that it is just and equitable in the circumstances of the case”
- Relevant “whether the person carrying on the regulated activity reasonably believed that he was not contravening the general prohibition”
- If the person against whom the agreement is unenforceable, elects not to perform the agreement, or as a result of this section recovers money paid or other property transferred by him, he must repay it or return the property

Handbooks, statutory duty/the Ombudsman scheme

- Part IXA s137A: rules and guidance
 - Principles for Business
 - MCOB
 - CONC
- S138D(2) a contravention of a rule made by the FCA is actionable at the suit of a private person (save as the rules provide)
- Unliquidated counterclaim does not prevent the entitlement to possession
- Part XVI (s225-s234B): the Ombudsman scheme



Regulated activities: mortgages

- Two relevant sections
 - Part XV: regulated mortgage contracts
 - Part XIVA: regulated credit agreements
- Focusing on regulated mortgage contracts

Regulated mortgage contracts

- Art 61:
- entering into a regulated mortgage contract as lender is a specified kind of activity
- administering a regulated mortgage contract is a specified kind of activity
 - notifying borrower of changes in interest rates, payments due, etc
 - taking any necessary steps for the purposes of collecting or recovering payments due under the contract from the borrower
 - a person is not to be treated as administering a regulated mortgage contract merely because he ... exercises, a right to take action for the purposes of enforcing the contract



What is a regulated mortgage contract?

Art 61(3): If at the time it is entered into

- (i) the contract is one under which a person (“the lender”) provides credit to an individual or to trustees (“the borrower”);
- (ii) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land in the EEA;
- (iii) at least 40% of that land is used, or is intended to be used:
 - (aa) in the case of credit provided to an individual, as or in connection with a dwelling; or
 - (bb) in the case of credit provided to a trustee which is not an individual, as or in connection with a dwelling by an individual who is a beneficiary of the trust, or by a related person

Agreeing that there is no intention to use as a dwelling

- *Waterside Finance Ltd v Karim* [2012] EWHC 2999 (Ch)
Interim injunction application to prevent receiver's sale
Borrower could not resile from the contractual basis of non-dwelling use
- *Dickinson v UK Acorn Finance Ltd* [2015] EWCA Civ 1194
Borrower can be *Henderson v Henderson* estopped from taking a point on regulation because unenforceability is at the borrower's election
- *Fortwell Finance Ltd v Halstead* [2018] EWCA Civ 676
Borrower could not resile from consent order made on the basis of no regulation



The exceptions

- Contracts entered into before 21 March 2016
- Contracts falling within art 61A
- Most common to encounter:
 - Limited payment second charge bridging loan
Number of payments not more than 4
 - Second charge business loan
Declaration of business purpose
 - Investment property loan
Think buy to let

Consumer buy to let mortgages

- Art 72l: consumer buy to let mortgage business has its own registration
- Entry/administration into such a mortgage is not a specified kind of activity if business is registered
- Still within the definition of a regulated mortgage contract
- Buy-to-let mortgage contract not entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower;
- Prohibits occupation by the borrower or a related person, and requires occupation under a rental agreement

Fortwell Finance Ltd v Halstead [2018] EWCA Civ 676

- Mortgage possession by unauthorised lender of, they said, non-regulated mortgage
- Consent order for possession in 28 days
- Attempt by the borrower to set aside the consent order on the basis that the mortgage agreement was regulated, and entering into a consent order was administering the agreement
- Art 61: “taking any necessary steps for the purposes of collecting or recovering payments due under the contract from the borrower”
- Making a compromise was not a necessary step, and legal proceedings were not administration

Gertner v CFL Finance Ltd [2020] EWHC 1241 (Ch)

- Claim under a guarantee settled by Tomlin order which allowed for staged payments of agreed sum
- Appeal was that the Tomlin order was a regulated credit agreement under the Consumer Credit Act 1974 and CFL was not authorised
- Not credit as the cause of action in the claim was replaced by the settlement
- However in principle the CCA could apply to a settlement; there is no public policy against it and s173 prevents contracting out

Current Covid-19 stay

- PD 51Z: stay of possession claims until the end of August 2020
- FCA guidance
- UK Finance guidance

S126 of the Consumer Credit Act 1974

A land mortgage securing an agreement of one the following types is enforceable (so far as is provided in relation to the agreement) on an order of the court only:

- (a) a regulated agreement;
- (b) a regulated mortgage contract;
- (c) a consumer credit agreement which would, but for article 60D of the Regulated Activities Order (exempt agreements: exemption relating to the purchase of land for non-residential purposes), be a regulated agreement.

Purpose, and effect of breach

- Time orders?
- *Waterside Finance Ltd v Karim* [2012] EWHC 2999 (Ch)

Unfair relationships under the Consumer Credit Act 1974

- S140A-s140C
- Unfair as to the terms of the agreement, the way in which the creditor has enforced his rights, any other thing done or not done by the creditor
- Powers of the court include: repay any sum, do or cease doing something, reduce or discharge any sum payable, alter the terms
- Wide discretion
- Does not apply to regulated mortgage contracts

Examples

- *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm) at [346]
Relevant factors including how commonplace the term is, whether there are sound commercial reasons, strength of bargaining position, availability of legal advice etc
- *Graves v Capital Home Loans Ltd* [2014] EWCA Civ 1297
Only in exceptional case is enforcement of a mortgage unfair
- *Greenlands Trading Ltd v Pontearso* [2019] EWHC 278 (Ch)
3% per month default lane not unfair as industry standard
- *Pilgrim Rock Ltd v Iwaniuk* [2019] EWHC 203 (Ch)
Unfair increase in interest on default, out of line with market, and a delay in enforcement



Litigating the FCA guidance?

- Pre-action protocol?
- Administration of Justice Act 1970 s36?
- FSMA 2000 s138D?
- Consumer Credit Act 1974 s126?
- Unfair relationships: s140A-C CCA 1974?

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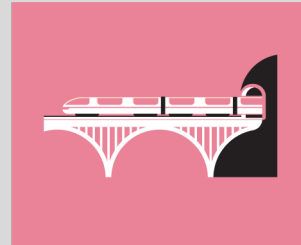
Falcon Court
London
EC4Y 1AA

T: 020 7353 2484

F: 020 7353 1261

Email: clerks@falcon-chambers.com

DX: 408 Lond/Chancery Lane



Falcon Chambers

www.falcon-chambers.com