Mortgage Moratorium Extended.

By Richard Mawrey QC

The length of the Covid-19 crisis has necessitated the extension of the FCA's rules for mortgage holidays introduced in March.

FCA Guidance

1. It was obvious even before the lockdown that it would have a serious effect on those with mortgages. The Treasury and the FCA, therefore, brought in rules as early as 20 March 2020 to mitigate the financial hardship. Consequently the FCA introduced 'guidance' which amounted to a series of rules for lenders. The principal planks of this guidance were the obligation on lenders to grant a three-month mortgage 'holiday' to mortgagees who found themselves in difficulty as a result of the lockdown and the prohibition on the lenders from repossessing homes in the interim. Coupled with this were rules for ensuring that customers did not suffer financially from the deferments granted by the mortgage holidays and did not find their credit rating impacted in consequence of the period of non-payment.

2. The FCA made it clear that the lender was to discuss the matter thoroughly and could come to a different solution with the mortgagee if the latter's circumstances required it, but the general rule was that those who were suffering genuine financial hardship and requested a three-month mortgage holiday should be given one. This was subject to the FCA's obvious caveat that it was confined to hardship caused by the coronavirus lockdown and mortgagees who were experiencing difficulties before or unrelated to the

lockdown should be deal with under the normal provisions of the CONC and MCOB sections of the FCA Handbook.

3. Now, two months after the lockdown started and with the United Kingdom only beginning to emerge and that very slowly, it is obvious that the financial consequences of coronavirus are going to last a great deal longer than three months. The Treasury and the FCA have therefore extended the effect of the guidance to 31 October 2020 and have issued updated guidance to lenders and to mortgagees.

Guidance not rules

4. As before, the FCA is proceeding by guidance rather than by rules. We must reiterate, however, that the FCA expects that its guidance will be followed to the letter and threatens regulatory action against those who might be tempted to disregard it. As the FCA puts it 'This guidance sets out our expectation that firms should provide, for a temporary period only, exceptional and immediate support to consumers facing payment difficulties due to circumstances arising out of coronavirus.' The FCA makes it clear that this guidance is based on PRIN 6, 'A firm must pay due regard to the interests of its customers and treat them fairly', PRIN 7 'A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading' and MCOB 2.5A.1R 'A firm must act honestly, fairly and professionally in accordance with the best interests of its customer'. Also as before the FCA warns that the guidance is 'potentially relevant to enforcement cases and the FCA may take it into account when considering whether it could reasonably have been understood or predicted at the time that the conduct in question fell below the standards required by Principle 6, Principle 7 and MCOB 2.5A.1R'.

5. Given the existence of PRIN 11 which obliges offenders to self-report to the FCA and penalises them further if they don't, it would be a bold lender who decided to disregard the 'guidance'.

Payment deferral

6. The FCA guidance defines 'payment deferral' as follows: 'an arrangement under which a firm permits the customer to make no or reduced payments under a regulated mortgage contract or a regulated home purchase plan for a specified period without being considered to be in payment shortfall. A "full payment deferral" is where the firm permits the customer to make no payments. A "partial payment deferral" is where the firm permits the customer to make reduced payments of any amount'. In short, it is a postponement of repayment not a remission of the instalments: the debt remains. That is not to say that a lender might not agree to write off interest for a period but deferral as contemplated by the FCA does not go that far.

Existing holidays

7. Where there is an existing mortgage holiday agreed between the lender and the mortgagee and the customer is still in financial difficulties, the parties are urged to get together to discuss the matter with a view to an extension of the holiday for a further three months or such period as is appropriate in the circumstances.

Customers who have not yet asked for a holiday

8. The original FCA guidance applied for a period of three months, during which, if the customer asked for a holiday and could substantiate hardship, a three-month holiday ought normally to be granted on request. Some

mortgagees, however, managed to struggle on with their mortgages but, months into the lockdown, are now feeling the wind. For them the FCA has extended the period during which a holiday may be requested until 31 October 2020.

9. The guidance is naturally the same as was given for the original holiday. It is for the mortgagee to approach the lender; the latter is not normally under any duty to be proactive (at least not beyond the situations where CONC and MCOB already require the lender to be proactive). If the mortgagee can show that he has genuine Covid-related hardship, the base figure is a three month deferral but it can always be tailored to meet the situation. The lender must give all the necessary information to the customer and the FCA provides a template at https://www.fca.org.uk/publications/guidance-consultations/draft-information-consumers-financial-difficulties-coronavirus

Life after Covid

10. The FCA is keen to stress that the duty to treat the customer fairly does not come to an end with the expiry of the deferral period.

11. It recognizes that customers fall into three basic categories: those who can resume full payment, those who are still in difficulties due to the lockdown and those who had problems dating back to before the lockdown

12. The key, as always, is full consultation between lender and borrower. This should start well before the end of the payment holiday. Pragmatically, the FCA takes the view that, if the customer does not bother to respond, the lender is entitled to treat him as someone who will resume full payments once the holiday comes to an end. The customer should be reminded that the next monthly payment after the holiday will fall due and explain what

will happen if it is not paid, together with how the missing instalments will be catered for (such as capitalisation of interest, extension of the mortgage term etc). The holiday is not expected to come without any adverse consequences and the customer should be warned that, for example, where unpaid interest is capitalised, the sum on which interest is payable is *pro tanto* increased and the total interest with it.

13. The situation with those who can resume full payments is fairly straightforward; it is simply a matter of getting back on track as soon as the customer can reasonably manage.

14. With those who cannot resume fall payments the situation is a bit more tricky. If the customer genuinely can't resume payments, the lender should offer a full or partial further deferral for three months. Indeed, says the guidance, 'a firm should not depart from this unless it can demonstrate that such a deferral is obviously not in the customer's best interests and a different option is more appropriate.'

15. Sensibly the FCA continues: 'firms should consider both the customer's need for immediate temporary support and the longer-term effects of a payment deferral on the customer's situation. In particular, they should consider the customer's ability to repay any accrued interest once the period of payment deferral ends, and over what period. A payment deferral would obviously not be in the customer's interests if it would give them a greater overall debt burden compared to other solutions that could equally meet the customer's needs, and lead to an unsustainable debt burden.'

16. The guidance recognizes the interaction between the difficulties faced by the customer and the necessity for the lender to be repaid its outlay even if later and on less profitable terms than was contemplated pre-Covid.

Repossessions

17. Here the guidance is stark. Possession proceedings should neither be started nor continued before 31 October 2020. Clearly this would be contrary to principles of lockdown and social distancing quite irrespective of any financial considerations involved.

Commencement of the guidance

18. The guidance was published in draft and a 48 hour window for representations given but there was no formal consultation and the guidance will come into force towards the end of the week commencing 25 May 2020. The text can be found at:

https://www.fca.org.uk/publications/guidance-consultations/mortgages-coronavirus-updated-draft-guidance-firms.

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