

RESEARCH ARTICLE

# Missing in action? Mortgage enforcement under section 126 of the Consumer Credit Act 1974

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## Abstract

This paper sets out the true ambit of section 126 of the Consumer Credit Act 1974, noting that it requires virtually all residential mortgage agreements to be enforced by court order. Despite this, numerous commentaries on the English law of mortgage omit reference to section 126. The implications of our findings are profound. Not least, many accounts of the law of mortgage will require substantial revision, including recognition of the fact that cases such as *Ropaigealach v Barclays Bank plc* and *Horsham Properties Group Ltd v Clark* were reversed as long ago as 2008. More significant is the need to ensure that accurate knowledge of section 126 is conveyed to those who advise mortgagors at risk of possession. This is particularly the case given the ‘cost of living crisis’ and the backlog of possession claims arising out of the Covid-19 pandemic. Any mortgagees tempted to expedite recovery of mortgaged property by enforcing the mortgage extra-judicially should be directed to section 126 and the requirement it imposes to obtain a court order.

**Keywords:** contract; commercial and consumer law; law of mortgage; Consumer Credit Act 1974; mortgage enforcement; *Ropaigealach v Barclays Bank plc*; *Horsham Properties Group Ltd v Clark*

## Introduction

Lord MacNaghten’s claim that ‘... no one, I am sure, by the light of nature ever understood an English mortgage of real estate’,<sup>1</sup> remains as relevant today as it did then. It is perhaps the complex nature of the English law of mortgage that explains, but should not excuse, what appears to be ignorance of an important aspect of the legal framework, namely, section 126 of the Consumer Credit Act 1974 (section 126). Hailed as ‘... the most comprehensive and sophisticated consumer credit statute ever to have been enacted in any country’,<sup>2</sup> the Consumer Credit Act 1974 (CCA 1974) ‘resulted in the sweeping away of a chaos of obsolete rules, and the substitution for them of a simpler and better enforced body of law’.<sup>3</sup> While the CCA 1974 was lauded for its rationalisation of the existing complex web of legislative provisions, its impact on the substance of consumer protection was minimal and resulted in only ‘marginal changes’.<sup>4</sup> This could not be said, however, of section 126, which altered

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<sup>1</sup>*Samuel v Jarrah Timber and Wood Paving Corp* [1904] AC 323, per Lord MacNaghten at [326].

<sup>2</sup>RM Goode ‘The Consumer Credit Act 1974’ (1975) 34(1) *The Cambridge Law Journal* 79 at 81.

<sup>3</sup>A Rogerson ‘The Consumer Credit Act 1974’ (1975) 38(4) *The Modern Law Review* 435 at 435.

<sup>4</sup>JJ McManus ‘The Consumer Credit Act 1974’ (1975) 2(1) *British Journal of Law and Society* 66 at 75.

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one of ‘the fundamental tenets of land law’<sup>5</sup> by inhibiting enforcement of the mortgagee’s inherent right to possession.

Arising out of the legal estate granted to them,<sup>6</sup> a legal mortgagee has a right to possession which allows them to ‘go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right’.<sup>7</sup> This right could be exercised without the supervision of a court, that is, until the introduction of section 126. Introduced to ensure that, ‘where a consumer has entered in a second mortgage agreement it will not be possible to turn him out of his house following default except on court order’,<sup>8</sup> the current version of section 126 (as amended by numerous statutory instruments over many years),<sup>9</sup> has, since 2008,<sup>10</sup> required virtually all residential mortgage agreements, including regulated agreements,<sup>11</sup> regulated mortgage contracts (RMCs),<sup>12</sup> and consumer credit agreements,<sup>13</sup> of any value to be enforceable on an order of the court only. Our focus here is on RMCs and, in particular, loans used to purchase residential property where that property is to be occupied by the borrower, ie we will not be examining the provisions as they relate to buy-to-let mortgages. RMCs are defined as:

- (a) a contract is a ‘regulated mortgage contract’ if, at the time it is entered into, the following conditions are met—
  - (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;
  - (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...<sup>14</sup>

Despite the apparent significance of section 126, there is substantial evidence of its omission from government reports,<sup>15</sup> case law,<sup>16</sup> and scholarly accounts of the English law of mortgage.<sup>17</sup> Dip into most scholarly texts and you will still see reference to the mortgagee’s ability to ‘repossess real property in the event of default without a court order, but only so long as her entry is “peaceable”’.<sup>18</sup> Authority for this is cited as *Ropaigealach v Barclays Bank plc*,<sup>19</sup> in which the Court of Appeal held that it was legitimate for a mortgagee to take possession of mortgaged property without the mortgagors’ knowledge and without a court order. A similar finding was made in *Horsham Properties Group Ltd v Clark*,<sup>20</sup>

<sup>5</sup>L Whitehouse ‘The first legal mortgagor: a consumer without adequate protection?’ (2015) 38(2) *Journal of Consumer Policy* 161 at 169.

<sup>6</sup>The Law of Property Act 1925, s 87(1).

<sup>7</sup>*Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317 per Harman J [320].

<sup>8</sup>Hansard HC Deb, vol 864, col 518, November 1973, The Minister for Trade and Consumer Affairs, Sir Geoffrey Howe.

<sup>9</sup>According to HM Treasury, since 1974, over 30 pieces of subordinate legislation have amended the CCA: see HM Treasury, ‘Reforming the Consumer Credit Act 1974 Consultation’, Dec 2022, p 14, para 2.4, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1122395/CCA\\_CP\\_211122\\_Final\\_Review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1122395/CCA_CP_211122_Final_Review.pdf).

<sup>10</sup>The CCA 2006, s 2(1)(b), removed the financial limit for consumer borrowing in April 2008.

<sup>11</sup>Defined by the CCA 1974, s 189 as a consumer credit agreement which is a regulated agreement (within the meaning of s 8(3)) or a consumer hire agreement which is a regulated agreement (within the meaning of s 15(2)).

<sup>12</sup>Defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Art 61(3)(a).

<sup>13</sup>Defined by the CCA 1974, s 8 as an agreement between an individual (‘the debtor’) and any other person (‘the creditor’) by which the creditor provides the debtor with credit of any amount.

<sup>14</sup>The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Art 61(3)(a).

<sup>15</sup>See, for example, Ministry of Justice *Mortgages Power of Sale and Residential Property* (CP55/09, 29 December 2009).

<sup>16</sup>See, for example, *Co-Operative Bank plc v Phillips* [2014] EWHC 2862 (Ch).

<sup>17</sup>Almost any textbook on Land Law.

<sup>18</sup>P MacMahon ‘Conflict and contract law’ (2018) 38(2) *Oxford Journal of Legal Studies* 270 at 290.

<sup>19</sup>[2000] QB 263.

<sup>20</sup>[2008] EWHC 2327 (Ch).

although here the finding was slightly wider in that the court held that both possession and sale could be obtained without a court order.

Perhaps the omission of section 126 may be explained by the complexity of the law of mortgage, the ‘rather impenetrable regulation’<sup>21</sup> surrounding the CCA 1974 and dwindling knowledge of housing law as a result of cuts to legal aid.<sup>22</sup> Alternatively, it may be that section 126 simply does not apply to most mortgage agreements. However, having searched high and low for reasons as to why section 126 would not apply, we cannot find any other than the limited exemptions contained in the regulations.<sup>23</sup> By virtue of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the RAO 2001), Article 61A(1), for example, an agreement is not a RMC if it is:

- (a) a regulated home purchase plan;
- (b) a limited payment second charge bridging loan;
- (c) a second charge business loan;
- (d) an investment property loan;
- (e) an exempt consumer buy-to-let mortgage contract;
- (f) an exempt equitable mortgage bridging loan; or
- (g) an exempt housing authority loan.

The question is whether the omission of section 126 matters. This paper will argue that, for legal, practical, and symbolic reasons, it does. In making the case for the recognition in the literature and strict observance in practice of section 126, this paper begins with an account of the background to the section and the changes made to it since its introduction. The latter is an unashamedly technical account, for without it, it would be impossible to evidence the true ambit of section 126. The tortuous process of uncovering every revision also goes some way to explaining why so many seem unaware of it. The next section provides evidence of the omission of section 126 from a range of scholarly literature, government reports and practice. It is perhaps understandable that knowledge of section 126 is limited, given that shortly after the introduction of the CCA 1974 aspects of it were described as ‘so technical as to be unintelligible to the average citizen and difficult for his lawyer’.<sup>24</sup> Add to this amendments made since 1974 by over 30 pieces of subordinate legislation and it comes as little surprise that it has resulted in ‘increasingly complex and incoherent regulation that is costly for firms and difficult for consumers to understand’.<sup>25</sup> In response, the Treasury has published a consultation document on reforming the CCA 1974.<sup>26</sup> While we await the outcome of that reform process, the penultimate section of this article makes the case for the retention of the requirement on the part of mortgagees to enforce the mortgage by a court order.

In exploring the justifications for and potential implications of the strict observance of section 126 it is argued that, while no sanctions arise from the its non-observance, it does offer the potential for some mortgagors to avoid the immediate loss of their home. This derives from the mortgagor’s ability to seek an injunction preventing the enforcement.<sup>27</sup> This can be raised as ancillary to some other relief

<sup>21</sup>L Finch ‘Regulated mortgage contract exemption’ Gough Square Chambers ‘Consumer Credit Column: February 2021’ (17 February 2021), available at <https://goughsq.co.uk/wp-content/uploads/2021/03/PLC-Feb-2021.pdf>.

<sup>22</sup>D Clarke et al ‘Mortgage possession claims: the changed legal landscape’ *Legal Action Magazine* (May 2018), available at <https://www.lag.org.uk/article/204910/mortgage-possession-claims--the-changed-legal-landscape>.

<sup>23</sup>See Consumer Credit (Exempt Agreements) Order 2007, SI 2007/1168 and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, Arts 60F and 60G. It may also be that the agreement does not qualify as a RMC.

<sup>24</sup>KE Lindgren ‘The Consumer Credit Act 1974: its scope’ (1977) 40(2) *The Modern Law Review* 159 at 173.

<sup>25</sup>HM Treasury, above n 9, p 16, para 2.11.

<sup>26</sup>*Ibid.* This consultation opened on 9 December 2022 and closed on 17 March 2023.

<sup>27</sup>RM Goode offers a detailed account of the consequences that might flow from a failure to comply with s 126: see above n 2, at 113, fnn 84 and 85.

such as an application for a suspended possession order under section 36 of the Administration of Justice Act 1970 (AJA 1970) or a time order under section 129 of the CCA 1974.

The paper will conclude by suggesting that while it is imperative that an accurate account of section 126 is conveyed in descriptions of the law of mortgage, more important is the need to extend knowledge of it beyond the academic community. Given the increase in the number of possession claims initiated in the courts<sup>28</sup> following the removal in 2021 of temporary measures introduced in response to the Covid-19 pandemic,<sup>29</sup> it is inevitable that hearings, and hence the recovery of possession, will take a considerable amount of time. There may be a temptation, therefore, on the part of some mortgagees to expedite the process by enforcing the mortgage without a court order, thereby avoiding the discretionary powers of the court to delay possession. As the Law Commission noted as long ago as 1986:

if enforcement without a court order continues to be permissible, there remains a danger that an unscrupulous mortgagee will pressurise a mortgagor into leaving the premises when the circumstances are such that the court would have refused to grant an immediate possession order.<sup>30</sup>

It is important, therefore, that mortgagors and those who advise them are aware of the need for mortgagees to seek a court order before taking possession, selling, or appointing receivers in respect of residential property subject to an agreement covered by the CCA 1974. This call for greater awareness of section 126 could be assisted by the Treasury's current consultation on reforming the CCA 1974. While it seems unlikely, given the Treasury's ambition 'of moving the majority of the [CCA 1974] from statute to FCA rules',<sup>31</sup> that it will result in the imposition of sanctions where none already exist, the hope is that it will at least retain the requirement to obtain a court order while simplifying the manner in which that requirement is expressed.

## 1. Background to section 126

In order to understand the significance of section 126 and Lord MacNaghten's exasperation regarding the complexity of the law of mortgage, it is necessary to have some understanding of the position prior to 2008 (when section 126 was reformed so as to include RMCs of any value). In relation to the right to possession, for example, it was clear, prior to 2008, that most first charge mortgagees could take possession of a mortgaged property without the need for a court order.<sup>32</sup> Care had to be taken to avoid criminal prosecution,<sup>33</sup> by ensuring that violence was not used, either against the occupier or the property, in order to gain entry.<sup>34</sup> Physical re-entry was, therefore, typically only undertaken where the mortgagor consented to the possession or had abandoned the property. In relation to residential mortgages, the taking of physical possession by a mortgagee of the secured property, where it was still occupied, appeared to be extremely rare,<sup>35</sup> but was not unknown.<sup>36</sup>

<sup>28</sup>From October–December 2022, compared to the same quarter in 2021, mortgage possession claims (3,160) are up 23%, mortgage orders for possession (2,482) are up 50%, warrants issued (2,112) are up 88% and repossessions (733) are up 134%: Ministry of Justice 'Mortgage and landlord possession statistics: October to December 2022', 9 February 2023, available at <https://www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-october-to-december-2022/mortgage-and-landlord-possession-statistics-october-to-december-2022>.

<sup>29</sup>For an account of those measures see L Whitehouse *Assessing the Court System's Response to the COVID-19 Pandemic in Housing Possession Cases* (January 2022), available at <https://tinyurl.com/yckswm99>.

<sup>30</sup>Law Commission *Land Mortgages*, Working Paper No 99, 1986, p 231.

<sup>31</sup>HM Treasury, above n 9, p 7.

<sup>32</sup>*Ropaigealach v Barclays Bank plc* [2000] QB 263.

<sup>33</sup>Criminal Law Act 1977, s 6.

<sup>34</sup>*Ibid*, s 6(4).

<sup>35</sup>See Law Commission, above n 30, p 103, para 3.69(a) and ELG Tyler (ed) *Fisher and Lightwood's Law of Mortgage* (London: Butterworths, 1988) p 333.

<sup>36</sup>*Horsham Properties Group Ltd v Clark* [2008] EWHC 2327 (Ch).

The ability to take possession extra-judicially derived from the mortgagee's legal estate in the secured property.<sup>37</sup> The means by which a legal mortgage of a registered estate is created, ie by a charge by deed expressed to be by way of legal mortgage,<sup>38</sup> affords the mortgagee the same powers, protection and remedies as if the mortgagee had a term of 3,000 years.<sup>39</sup> This includes the *right* to possession which can be enjoyed regardless of default by the mortgagor.<sup>40</sup>

Prior to 2008, therefore, most mortgagees could simply enter mortgaged premises without reference to established procedures or supervision by a court. It was suggested in *Quennell v Maltby*,<sup>41</sup> that a mortgagee would be prevented from obtaining possession, 'except where it is sought bona fide and reasonably for the purpose of enforcing the security and then only subject to such conditions as the court thinks fit to impose'.<sup>42</sup> Described as 'somewhat unusual'<sup>43</sup> and a 'mildly controversial decision'<sup>44</sup> *Quennell* has received judicial support in respect of commercial disputes decided by the Privy Council.<sup>45</sup> However, academic commentary suggests that its significance is minimal.<sup>46</sup> As Haley notes, it 'was never claimed by the Chancery Division and stands against previous authorities. The validity of this equity is, therefore, open to much doubt...'.<sup>47</sup> He concludes that in effect, Lord Denning's equity is confined to mortgages of commercial premises.<sup>48</sup>

To this extent, therefore, it was argued that the mortgagee's right to possession remained unqualified except in relation to limitations imposed by the contractual agreement.<sup>49</sup> Those contractual limitations tended to take the form of an express term stating that the mortgagee would not seek possession until the mortgagor was in default. Such terms are still included in most residential mortgage contracts today. The mortgagee's principal concern usually is to ensure that the mortgagor makes regular payments. It is not in the mortgagee's interests, therefore, to take possession until default in such payments.<sup>50</sup> This is particularly so given the duties imposed on a mortgagee in possession, which includes taking reasonable care of the property.<sup>51</sup> It should be noted that prior to initiating a claim for possession, all mortgage providers have, since 2008, been subject to pre-action requirements designed to avoid the need for enforcement measures.<sup>52</sup> These requirements have been criticised for lacking 'teeth' and therefore do little to mitigate the mortgagee's inherent right to possession.<sup>53</sup>

Despite the ability of mortgagees to take possession without the supervision of a court, it seemed that the majority of mortgagees did seek a possession order from the County Court.<sup>54</sup> The reason so many

<sup>37</sup>RJ Smith 'The mortgagee's right to possession – the modern law' (1979) Conv 266.

<sup>38</sup>The Law of Property Act 1925, s 85(1) as amended by the Land Registration Act 2002, s 23(1)(a).

<sup>39</sup>*Ibid*, s 87(1).

<sup>40</sup>In strict terms, an action for possession by a legal mortgagee is not a remedy but a 'right': see *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317 per Harman J [320].

<sup>41</sup>[1979] 1 All ER 318.

<sup>42</sup>*Quennell v Maltby* [1979] 1 All ER 318 per Lord Denning [322G–H].

<sup>43</sup>MP Thompson 'The powers and duties of mortgagees' (1998) Sep/Oct Conv 391 at 392.

<sup>44</sup>M Dixon 'Mortgage duties and commercial property transactions' (2006) May/June Conv 278 at 280.

<sup>45</sup>*Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 and *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 25.

<sup>46</sup>For an account of the treatment of *Quennell*, see C Bevan *Land Law* (Oxford: Oxford University Press, 2022) p 580.

<sup>47</sup>M Haley 'Mortgage default: possession, relief and judicial discretion' (1997) 17 Legal Studies 483 at 488.

<sup>48</sup>*Ibid*, at 488, fn 28.

<sup>49</sup>See K Gray *Elements of Land Law* (London: Butterworths, 1993) p 990, Haley, above n 47, at 488 and Smith, above n 37, at 268.

<sup>50</sup>PB *Fairest Mortgages* (London: Sweet & Maxwell, 1980) p 78.

<sup>51</sup>*Palk v Mortgage Services Funding plc* [1993] 2 WLR 415 per Nicholls V-C [421A].

<sup>52</sup>The Financial Conduct Authority's *Mortgages and Home Finance Conduct of Business Sourcebook* and the CPR 'Pre-Action Protocol for Possession Claims Based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property' require mortgagees to treat possession as a last resort.

<sup>53</sup>See L Whitehouse 'The mortgage arrears Pre-action Protocol: An opportunity lost' (2009) 72(5) *Modern Law Review* 793. See also H Carr 'Housing the vulnerable subject: the English context' in MA Fineman and A Gear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Surrey: Ashgate, 2013) p 108.

<sup>54</sup>Law Commission, above n 30, p 103, para 3.69(a).

chose to seek a court order for possession prior to 2008 was probably due to the problems inherent in the taking of physical possession rather than adherence to a requirement of due process. It may also be due to the fact that a mortgagee has 'little to fear' by initiating a claim.<sup>55</sup> The reason for this derives from the mortgagee's inherent right to possession which ensures that in most cases involving a dwelling house, the mortgagee is either awarded outright possession (delayed for up to 28 days to allow the mortgagor to find alternative accommodation) or a suspended possession order under which the mortgagor will be required to repay the normal contractual payments plus an amount off any outstanding arrears.<sup>56</sup>

These adjournment powers derive from section 36 of the AJA 1970, which, in a claim for possession under a mortgage of land which includes a dwelling house, allows the court discretion to adjourn an action for possession or postpone the grant of an order for possession if it appears to the court that the mortgagor is likely, within a reasonable period, to be able to pay any sums due or to remedy any other default. The significance of section 36 of the AJA 1970 for the purposes of this paper is that it led some to argue that it imposed a duty upon mortgagees to seek possession through the courts.

### *(a) Previous (failed) attempts to make mortgage enforcement subject to judicial scrutiny*

Clarke, writing in 1983,<sup>57</sup> argued that, to allow mortgagees to take possession without first obtaining a court order would deny the intention of Parliament in enacting section 36 of the AJA 1970 which was to provide 'assistance to a mortgagor who found himself temporarily in difficulty'.<sup>58</sup> Clarke's contention was refuted by the Law Commission when it noted that the court, '... can exercise its discretion only if the mortgagee applies to it for a possession order: technically, therefore, the mortgagee can deprive the mortgagor of protection by electing to seek some other means of enforcement'.<sup>59</sup>

This was confirmed by the Court of Appeal in the case of *Ropaigealach v Barclays Bank plc*.<sup>60</sup> The question before the court was whether a mortgagee was entitled to take possession of a dwelling house without a court order. In holding that the mortgagee was so entitled, Chadwick LJ summarised his reasoning in the following terms, 'I find it impossible to be satisfied that Parliament must have intended, when enacting s 36 of the Act of 1970, that the mortgagee's common law right to take possession by virtue of his estate should only be exercisable with the assistance of the court'.<sup>61</sup> Interestingly, Clarke LJ raised section 126 as a possible alternative source of assistance to the mortgagor but noted that it did not apply here as the limit at the time was an agreement not exceeding £15,000.<sup>62</sup> The limit was in fact £25,000.<sup>63</sup> While this would not have assisted the Ropaigealachs, as the original loan exceeded this amount, it highlights the confusion surrounding the CCA 1974. Given that the financial limit on mortgages covered by the CCA 1974 was removed in 2008, the question arises as to whether section 126 now applies to cases similar to *Ropaigealach*. In answering that question, the following section offers an account of the development of section 126 in order to prove that it does.

## 2. The development of section 126

What follows is a chronological and meticulous working through of the changes made to section 126. The fact that such a forensic level of investigation is necessary in order to understand the true extent of

<sup>55</sup>Whitehouse, above n 5, at 169.

<sup>56</sup>The Administration of Justice Act 1970, s 36.

<sup>57</sup>A Clarke 'Further implications of section 36 of the Administration of Justice Act 1970' (1983) Conv 293.

<sup>58</sup>Hansard HC Deb, vol 795, col 458, 4 February 1970, the Attorney-General, Sir Elwyn Jones.

<sup>59</sup>Law Commission, above n 30, p 103, para 3.69(a). See also Law Commission *Transfer of Land – Land Mortgages* No 204, 1991, p 38, para 6.16.

<sup>60</sup>[2000] QB 263.

<sup>61</sup>*Ropaigealach v Barclays Bank plc* [2000] QB 263 per Chadwick LJ [282].

<sup>62</sup>*Ibid*, per Clarke LJ [284].

<sup>63</sup>The limit was increased on 1 May 1988 from £15,000 to £25,000 by virtue of the Consumer Credit (Increase of Monetary Limits) (Amendment) Order 1998, SI 1998/996. The Ropaigealach's entered into their mortgage agreement on 30 September 1988.

section 126 may go some way to explaining why so few commentators appear to be aware of it. As Clarke LJ noted in relation to the CCA 1974 in 2002:

simplification of a part of the law which is intended to protect consumers is surely long overdue so as to make it comprehensible to layman and lawyer alike. At present it is certainly not comprehensible to the former and is scarcely comprehensible to the latter.<sup>64</sup>

Our hope is that what follows goes some way in clarifying (if not simplifying) what is a technical but significant area of mortgage regulation.

### (a) *The position prior to 2008*

By virtue of the CCA 1974 as originally implemented, consumer credit agreements (which included mortgage loans) of less than £5,000,<sup>65</sup> made by a creditor other than a building society,<sup>66</sup> were subject to its provisions. This included section 126 which stated that, ‘a land mortgage securing a regulated agreement is enforceable (so far as provided, in relation to the agreement) on an order of the court only’. Given that the vast majority of first charge loans in the 1970s were provided by building societies,<sup>67</sup> this meant that the CCA 1974 was originally applicable only to second charge mortgage lending up to a specified (and relatively low) amount.

The focus given to second charge lending, rather than loans used to purchase the property, was made evident in the report of the Crowther Committee, established to review UK consumer credit law and the basis for the CCA 1974. As Brown notes:

The Crowther Committee had made it clear in their Report in 1971 that they regarded credit for the purchase of a private house as already adequately protected by other regulation. A second mortgage on residential property where the loan was for consumption purposes was, however, another matter.<sup>68</sup>

The justification for the enhanced protection afforded to second mortgages was based on the assumption that mortgagors within the secondary mortgage market were more vulnerable to exploitation at the hands of unscrupulous lenders.<sup>69</sup> The clear distinction between first mortgages (provided by building societies) and second mortgages (provided by a range of providers) became blurred during the 1980s when the then Conservative government deregulated the mortgage market.<sup>70</sup> This encouraged new institutional lenders to provide first charge loans including banks, insurance companies and specialised mortgage lenders. As a result of these changes, these mortgage lenders (but not building societies), in respect of loans of less than £15,000, fell under the CCA 1974.

In an effort to simplify the regulation of the increasingly complex financial services market in the UK, the government introduced the Financial Services and Markets Act 2000 (FSMA 2000) which subsumed nine individual regulators into a single ‘super regulator’ known as the Financial Services Authority (FSA).<sup>71</sup> As part of this process, the RAO 2001 introduced RMCs, which at the time (2002) were defined as a contract under which:

<sup>64</sup>*McGinn v Grangeworth Securities Ltd* [2002] EWCA Civ 522 per Clarke LJ [1].

<sup>65</sup>Consumer Credit Act 1974, s 8(2) as originally implemented.

<sup>66</sup>Agreements secured by a land mortgage provided by a building society qualified as ‘exempt agreements’ under the CCA 1974, s 16.

<sup>67</sup>See T Edmonds ‘Consumer credit regulation’ House of Commons Library, Briefing Paper Number 06842, 7 March 2014, p 6.

<sup>68</sup>S Brown ‘The Consumer Credit Act 2006; real additional mortgagor protection’ (2007) Jul/Aug Conv 316 at 318.

<sup>69</sup>See Whitehouse, above n 5.

<sup>70</sup>See, for example, D Cowan *Housing Law and Policy* (Cambridge: Cambridge University Press, 2011) pp 41–43 and MP Kleinman and CME Whitehead ‘British housing since 1979: has the system changed?’ (1988) 3 Housing Studies 3.

<sup>71</sup>DAC Beachcroft ‘20 years on: is financial services regulation in the UK still fit for purpose?’ 1 December 2021, available at <https://www.dacbeachcroft.com/en/gb/articles/2021/december/20-years-on-is-financial-services-regulation-in-the-uk-still-fit-for-purpose/>.

- (i) a person ('the lender') provides credit to an individual... ('the borrower'); and
- (ii) the obligation of the borrower to repay is secured by a first legal mortgage on land (other than timeshare accommodation) in the United Kingdom, at least 40% of which is used, or is intended to be used, as or in connection with a dwelling by the borrower...<sup>72</sup>

The introduction of RMCs created a new category of agreement, distinguishing them from the original 'consumer credit agreements' regulated by the CCA 1974. By virtue of the definition of RMCs, first legal mortgages, regardless of the type of lender (thereby removing the previous distinction between building societies and other lenders), were to be regulated under the FSMA 2000. In an effort to ensure that the regulation of first and second charge lending remained distinct, RMCs were in September 2002 made exempt from many of the provisions contained in the CCA 1974 by the insertion in the CCA 1974 of section 16(6C):<sup>73</sup>

This Act does not regulate a consumer credit agreement if—

- (a) it is secured by a land mortgage; and
- (b) entering into that agreement as lender is a regulated activity for the purposes of the Financial Services and Markets Act 2000.

However, significant for our purposes was the fact that the new section 16(6D)<sup>74</sup> made it clear that RMCs were subject to section 126, 'section 126... applies to an agreement which would (but for subsection (6C)) be a regulated agreement'. It would seem, therefore, that section 126 was made applicable to RMCs in 2002 albeit with a loan limit of what was then £25,000.<sup>75</sup>

Further changes were made to the regulation of first and second charge mortgage lending in October 2004 when the FSA took over the regulation of first charge lending, with the Office of Fair Trading (OFT) responsible for regulating second mortgages. As part of its remit, the FSA replaced the Mortgage Code, a self-regulatory instrument, with the Mortgages and Home Finance: Conduct of Business sourcebook (MCOB).<sup>76</sup> By virtue of the MCOB, mortgagees were (and still are) expected to treat customers fairly and to consider possession as a last resort.<sup>77</sup>

As regards the CCA 1974, the financial limits specified in the Act increased over time,<sup>78</sup> reaching a maximum of £25,000 before being removed entirely by the CCA 2006 in April 2008.<sup>79</sup> At this point, therefore, RMCs, ie first legal mortgages, of any value were exempt from the CCA 1974 *except for* section 126.

### ***(b) A new era of regulation***

On 1 April 2013, the Financial Conduct Authority (FCA) replaced the FSA and on 1 April 2014 took over from the OFT, thereby becoming responsible for regulating both first and second charge

<sup>72</sup>The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Art 61(3)(a), as originally enacted in 2002.

<sup>73</sup>The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, Art 90 inserted new ss 16(6C), (6D) and (6E) into the CCA 1974.

<sup>74</sup>Inserted by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, Art 90.

<sup>75</sup>CCA 1974, s 8(2) as of September 2002.

<sup>76</sup><https://www.handbook.fca.org.uk/handbook/MCOB/1/?view=chapter>.

<sup>77</sup>HM Treasury, above n 9.

<sup>78</sup>By virtue of the Consumer Credit (Increase of Monetary Limits) Order 1983, 1983/1878, the limit was increased in 1985 from £5,000 to £15,000 and by virtue of the Consumer Credit (Increase of Monetary Limits) (Amendment) Order 1998, SI 1998/996, the limit was increased on 1 May 1988 from £15,000 to £25,000.

<sup>79</sup>CCA 2006, s 2(1)(b).



mortgage lending.<sup>80</sup> During this process of transition in the regulation of mortgage finance, further changes were made to the CCA 1974. In 2013, section 16 of the CCA 1974 (which listed the exemptions to the CCA 1974) was omitted,<sup>81</sup> and replaced by Chapter 14A, Articles 60C–60H of the RAO 2001.<sup>82</sup> By virtue of Article 60C(2) of the RAO 2001, as originally implemented, ‘A credit agreement is an exempt agreement if it is a regulated mortgage contract...’. However, unlike under the previous section 16(6D) of the CCA 1974, there was no reference to section 126 remaining applicable to RMCs. It would seem therefore that, at first glance, the 2013 reforms removed the application of section 126 to RMCs. However, amendments were made at the same time to section 126, to include specific reference to RMCs, ‘a land mortgage securing a regulated agreement or a regulated mortgage contract (within the meaning of the Regulated Activities Order) is enforceable (so far as provided in relation to the agreement) on an order of the court only’.<sup>83</sup>

Shortly afterwards, on 14 February 2014, section 126 was amended again to include a new subsection (2) which made it explicit that RMCs were subject to, among other things, the need to obtain a court order under section 126 and the time order process under section 129 of the CCA 1974,<sup>84</sup>

- (1) A land mortgage securing a regulated agreement or a regulated mortgage contract (within the meaning of the Regulated Activities Order) is enforceable (so far as provided in relation to the agreement) on an order of the court only.
- (2) subject to section 140A(5) (unfair relationships between creditors and debtors), for the purposes of subsection (1) and Part 9 (judicial control), a regulated mortgage contract which would, but for article 60C(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, be a regulated agreement is to be treated as if it were a regulated agreement.<sup>85</sup>

Yet another change to the wording of section 126 was made on 30 March 2014.<sup>86</sup> This now represents the current wording so that it reads as follows:

126 (1) 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.

(2) Subject to section 140A(5) (unfair relationships between creditors and debtors), a regulated mortgage contract which would, but for article 60C(2) of the Regulated Activities Order (exempt agreements: exemption relating to the nature of the agreement), be a regulated agreement is to be treated for the purposes of Part 9 (judicial control) as if it were a regulated agreement.

<sup>80</sup>L Finch ‘Consumer credit regulation, the Financial Conduct Authority and CONC’ (2014) *Journal of Financial Law* 28.

<sup>81</sup>By the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2013, SI 2013/1881, Arts 1(2)(6) and 20(5).

<sup>82</sup>*Ibid.*, Arts 1(2) and 6.

<sup>83</sup>*Ibid.*, Arts 1(2)(6) and 20(38). The change to s 126 came into effect in July 2013.

<sup>84</sup>See the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014, SI 2014/366, Art 3(3).

<sup>85</sup>The new s 126(2) was inserted by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014, SI 2014/366, Arts 1(3)(4) and 3(b).

<sup>86</sup>See the Financial Services and Markets Act 2000 (Consumer Credit) (Miscellaneous Provisions) (No 2) Order 2014, SI 2014/506, Arts 1(2) and 5(4).

The key issue to note here is that, unlike all other versions since 2002, the current wording of section 126 does not make it explicit that the general exemption of RMCs from the CCA 1974 (under Article 60C(2) of the RAO 2001) does not apply here. In other words, based on previous versions of section 126, we might have expected it to say:

126(1)(b) a regulated mortgage contract, **which would, but for article 60C(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, be a regulated agreement.**

The question therefore is, did this remove RMCs from the remit of section 126(1)?

*(c) Are RMCs exempt from section 126?*

It is our contention that this would be a perverse interpretation given the explicit inclusion of RMCs in section 126(1). Perhaps more significantly, the explanatory note to the March 2014 reforming statutory instrument states that ‘Article 5 also amends the Consumer Credit Act 1974 to preserve the application of section 126 of that Act (enforcement of land mortgages) to residential and buy-to-let mortgages’.<sup>87</sup>

Further support for our claim that RMCs are covered by section 126 is provided by the FCA in its Perimeter Guidance Manual (PERG) which states that:

for the purposes of section 126(1) of the CCA (a land mortgage securing a regulated credit agreement is enforceable (so far as provided in relation to the agreement) on an order of the court only) and Part 9 of the CCA (judicial control) a regulated mortgage contract which would, but for the exemption in PERG 2.7.19CG(1), be a regulated credit agreement is to be treated as if it were a regulated credit agreement.<sup>88</sup>

This suggests that section 126(1) does apply to RMCs. The implications of this finding as regards the number of mortgages that have to be enforced through a court order are made more significant by the fact that the FCA was tasked, as a result of the implementation of the Mortgage Credit Directive on credit agreements for consumers relating to residential immovable property (MCD),<sup>89</sup> with making RMCs and second mortgages subject to the FSMA 2000 by 2016. This led to the reclassification on 21 March 2016 of second mortgages as RMCs,<sup>90</sup> and reform of the definition of RMC so as to exclude reference to ‘secured by a first legal mortgage’ replacing it instead with ‘secured by a mortgage on land’.<sup>91</sup> This means that the original distinction between first and second mortgages has gone and most residential mortgage agreements are now subject to regulation by the FCA under the FSMA 2000 and the MCOB. They are also subject to section 126, as confirmed by the FCA:

Mortgage firms should note that some CCA provisions extend to regulated mortgages which are otherwise regulated under our Mortgages and Home Finance: Conduct of Business sourcebook (MCOB). These include section 126 (enforcement of land mortgages) and section 129 (time orders). In addition, some CCA provisions continue to apply to second charge mortgages entered into before 21 March 2016, even though the loans are now regulated mortgage contracts.<sup>92</sup>

<sup>87</sup>The Financial Services and Markets Act 2000 (Consumer Credit) (Miscellaneous Provisions) (No 2) Order 2014, SI 2014/506, Explanatory Note.

<sup>88</sup>PERG 4.17.2.

<sup>89</sup>(2014/17/EU).

<sup>90</sup>The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2016, SI 2016/392, Art 2(18) inserted the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, Art 61(5) so as to include contracts that were regulated credit agreements immediately before 21 March 2016.

<sup>91</sup>The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Art 61(3)(a)(ii).

<sup>92</sup>Financial Conduct Authority ‘Review of retained provisions of the Consumer Credit Act: Final report Presented to Parliament pursuant to paragraph 20(8) of Part 5 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014, SI 2014/366’ (March 2019) para 1.14.

**(d) What constitutes ‘enforcement’ under section 126?**

Having established that RMCs are covered by section 126, the next question concerns the meaning of ‘enforcement’. By virtue of section 65(2) of the CCA 1974, the ‘retaking of goods or land to which a regulated agreement relates is an enforcement of the agreement’. The Law Commission, while accepting that this includes the sale of the mortgaged property, questions whether enforcement also includes possession and appointment of a receiver.<sup>93</sup> Despite this, the Law Commission’s report goes on to include a section on the ‘enforcement of mortgages’ which includes discussion of action on the personal covenant, possession, sale, appointment of a receiver and foreclosure, referring to the taking of possession without a court order as ‘enforcement’.<sup>94</sup> Kenna and Lynch-Shally make the point regarding possession and sale in more explicit terms, noting that the CCA 1974 ‘mandates a court order as a pre-requisite to possession and sale by the lender’.<sup>95</sup>

The question of what constitutes enforcement was addressed in *Waterside Finance Ltd v Ashraf Karim*.<sup>96</sup> Here the mortgagee appointed (without first obtaining a court order) Law of Property Act receivers who sold the property at auction. The mortgagor claimed that this was a breach of section 126. On this point, Norris J to an extent explored the question of whether the appointment of receivers and a subsequent sale by them qualified as ‘enforcement’:

For present purposes it is accepted by Mr Kremen, who appears for Waterside, that that provision [s 126] affects the land mortgage that was taken by Waterside and also, for the purposes of argument, he accepts that the appointment of a receiver and/or a sale by the receiver are, (and/or that completion of the sale would be), enforcement of the land mortgage. He therefore accepts for the purpose of this application that there is a breach of section 126 of the Consumer Credit Act.<sup>97</sup>

It would seem therefore that section 126 requires a court order in relation to possession, sale, and the appointment of a receiver.

**(e) ‘So far as is provided in relation to the agreement...’**

Another reason section 126 might not apply to RMCs and hence its omission from so many sources is that it is excluded by the contract. The section makes reference to enforcement ‘so far as is provided in relation to the agreement’. Does this mean that if the agreement states clearly that enforcement can be undertaken without a court order then that trumps section 126? This is certainly true of section 103 of the Law of Property Act 1925 (LPA 1925), which requires certain events to have occurred before a mortgagee is entitled to exercise the power of sale in section 101 of the LPA 1925. By virtue of section 101(4) of the LPA 1925, section 103 can be excluded by the mortgage deed and most mortgage contracts take advantage of this, including the Nationwide Building Society, ‘our right to sell your property is free from the restrictions in the Property Acts’.<sup>98</sup>

Does the wording of section 126 allow for an equivalent exclusion? Our interpretation of ‘so far as is provided in relation to the agreement’ is that it relates to the means of enforcement, not the process by which it is conducted. Hence, if the mortgage contract spells out how the agreement might be enforced then any attempt to use the measures specified must, by virtue of section 126, be obtained

<sup>93</sup>The Law Commission, for example, questions whether enforcement includes taking possession and appointment of a receiver, citing AG Guest and MG Lloyd *Encyclopaedia of Consumer Credit Law*, General Note, para 2.127: see the Law Commission, above n 30, p 102, fn 182.

<sup>94</sup>*Ibid*, p 103, para 3.69(a).

<sup>95</sup>P Kenna and K Lynch-Shally ‘Comparing mortgage law in England and Ireland’ (2014) 4 *Conv* 294 at 303.

<sup>96</sup>[2012] EWHC 2999 (Ch).

<sup>97</sup>*Ibid*, [22].

<sup>98</sup>Nationwide Building Society ‘Important things to know about your mortgage General Mortgage Conditions 2019’, p 10 available at <https://www.nationwide.co.uk/-/assets/nationwidecouk/documents/about/information-for-lawyers/forms-and-downloads/m139a-general-mortgage-conditions.pdf?rev=a1f2cfc8d1e4f4fb59ff697ea50b3f5>.

via a court order. According to the Nationwide Building Society, for example, ‘If you default and we have written to you asking for payment of the money you owe us, we may immediately take steps to repossess the property, sell the property, appoint a receiver (not in Scotland).’<sup>99</sup> There is no mention of the process that will be adopted in relation to those enforcement options. Halifax employs slightly different language in its terms and conditions:

We may make you leave your property so we can take possession of it. We might have to get a court order before we can do this; We may let your property on any reasonable terms; We may sell your property, even if we have not taken possession of it, and use the money from the sale to pay what you owe us under the agreement.<sup>100</sup>

Again there is nothing to suggest that standard terms and conditions for RMCs exclude the operation of section 126. We would argue that the CCA 1974 does not entitle them to do this in any event by virtue of the ‘no contracting-out’ provision in section 173 of the CCA 1974, which states that any term in a regulated agreement (which includes RMCs) will be void if it is ‘inconsistent with a provision for the protection of the debtor... contained in this Act or in any regulation made under this Act’.

### 3. Missing in action

Having established that provisions of the CCA 1974, including section 126, have applied to RMCs of limited value since 2002 and RMCs of any value since 2008, it is perhaps surprising to find that reference to it in scholarly and other texts remains scant. While some practitioner texts make brief mention of the need to obtain a court order under section 126,<sup>101</sup> most if not all textbooks on land law omit reference to it or fail to note its applicability to RMCs. It is common for texts to claim that, as regards the right to possession, a court order is not necessary but that mortgagees seek one in any case due to reasons other than section 126. Taking only one example from the multitude of relevant textbooks,<sup>102</sup> Clarke and Greer note that:

Although the mortgagee has the right to take possession of the premises, it will very rarely do so—particularly if the premises are occupied—without a court order. This is largely because the mortgage runs the risk of breaking the criminal law under Criminal Law Act 1977, s 6(1)...<sup>103</sup>

It is telling also that the CCA 1974 does not appear in *Blackstone’s Statutes on Property Law*.<sup>104</sup> Unusually, McFarlane, Hopkins, and Nield in their textbook on land law do offer a detailed account of the application of the CCA 1974 but do not specify which agreements are covered by the 1974 Act, noting only that those that are will be subject to section 126 and other provisions, ‘A lender must obtain a court order for possession where the mortgage is regulated by the CCA 1974...’<sup>105</sup> This is perhaps not surprising given, as the Law Commission notes, ‘one of the major complexities in the present law is trying to ascertain which mortgages are currently excluded from the Consumer Credit Act regulation’.<sup>106</sup> The authors do, however, go on to imply that RMCs are excluded from virtually all of the CCA 1974:

<sup>99</sup>Ibid.

<sup>100</sup>Halifax, ‘Halifax Mortgage Conditions 2019’ Ch 13 – Our right to take possession of your property or deal with it in other ways, p 40 available at <https://www.halifax-intermediaries.co.uk/pdf/halifax-mortgage-conditions.pdf>.

<sup>101</sup>It is mentioned briefly in *Fisher and Lightwood’s Law of Mortgage*, 15th edn (London: Lexis Nexis, 2019), at paras 20.18 and 30.22, and in a little more detail in S Tozer and C Crampin *Mortgage Receivership: Law and Practice* (London: Wildys, Simmonds and Hill Publishing, 2018) paras 3.89–3.96.

<sup>102</sup>See also Bevan, above n 46, p 578 and MacMahon, above n 18, at 290.

<sup>103</sup>S Clarke and S Greer *Land Law Directions*, 7th edn (Oxford: Oxford University Press, 2020) p 425.

<sup>104</sup>M Thomas *Blackstone’s Statutes on Property Law*, 30th edn (Oxford: Oxford University Press, 2022).

<sup>105</sup>B McFarlane et al *Land Law*, 2<sup>nd</sup> edn (Oxford: Oxford University Press, 2020) p 288, para 8.44.

<sup>106</sup>Law Commission *Transfer of Land – Land Mortgages* No 204, 1991, p 31.

... legal charges were excluded from almost all of the CCA 1974 when they became subject to FSMA 2000 regulation in 2004, and the regulatory transfer to the FCA of second charges and consumer Buy to Let mortgages followed in 2016.<sup>107</sup>

### (a) Empty or abandoned properties

Numerous accounts of the law of mortgage suggest that possession is usually obtained through the courts but that it can be taken extra-judicially where the mortgagor consents, the property is empty, or the mortgagor has abandoned the property. Cooke, for example, notes that where the mortgagor ‘voluntarily hands over’ possession then a court order is not necessary.<sup>108</sup> These accounts appear to reiterate the clear indication by the FCA that section 126 ‘does not... prevent enforcement with the consent of the mortgagor given at the time’.<sup>109</sup> There exists, however, a degree of misunderstanding regarding the position where the mortgagor *consents* to the enforcement as opposed to the position where the property is empty or abandoned. Cooke, for example, goes on to say that where the mortgagor voluntarily hands over possession then a court order is not necessary but:

... more troubling is the situation where the mortgagee takes possession when the property is in fact vacant, without a court order, but in circumstances where the property was not vacated for that purpose. This is lawful, [cites *Ropaigealach v Barclays Bank plc* [2000] QB 263] and section 36 of the AJA 1970 has no application in these circumstances.<sup>110</sup>

We would respectfully argue that this is not correct. The reason for this relates to the justification underlying these claims. The reason given by many scholars for the willingness of mortgagees to take possession of empty or abandoned properties without a court order is that it avoids the risk of sanctions being imposed under the Criminal Law Act 1977 (CLA 1977). As Bevan notes:

Possession by re-entry runs the real risk of incurring criminal liability for assault or battery. Executing possession under an order of the court is therefore the most common and evidently the safest route to possession unless the mortgaged property is empty.<sup>111</sup>

A similar assertion can also be found in case law. For example, in *Co-Operative Bank plc v Phillips*,<sup>112</sup> Morgan J noted that, ‘... the mortgagee’s right to possession may be exercised out of court provided that the taking of possession does not involve a contravention of the criminal law under s 6 of the Criminal Law Act 1977’.<sup>113</sup> These accounts, however, fail to note that providers of RMCs have, since 2008, been obliged to seek a court order by virtue of section 126. The question therefore is, does the requirement to obtain a court order apply to empty or abandoned properties? We argue that it does.

The reason for this is that mortgagees can only enforce a mortgage without a court order with the mortgagor’s ‘consent given at that time’. This is made clear in section 173(3) of the CCA 1974, an exception to the ‘no contracting-out’ provision in section 173(1) of the CCA 1974, which says that ‘notwithstanding subsection (1), a provision of this Act under which a thing may be done in relation to a person on an order of the court or the FCA only shall not be taken to prevent its being done at any time with that person’s consent given at that time ...’. The subsection makes it clear that consent to

<sup>107</sup>McFarlane et al, above n 105, p 303, para 8.86.

<sup>108</sup>E Cooke, *Land Law*, 3<sup>rd</sup> edn (Oxford: Oxford University Press, 2020) p 146.

<sup>109</sup>Financial Conduct Authority, above n 92, para 2.06.

<sup>110</sup>Cooke, above n 108, p 146.

<sup>111</sup>Bevan, above n 46, p 578.

<sup>112</sup>[2014] EWHC 2862 (Ch).

<sup>113</sup>*Ibid*, [41].

exclude the operation of section 126 must be given at the time, ie given in response to the taking of possession extra-judicially.

While there may be a temptation on the part of mortgagees to view empty or abandoned properties as constituting implicit consent on the part of the mortgagor, it would set a dangerous precedent if this were to be accepted. As demonstrated in *Ropaigealach*, the mortgaged property was unoccupied (as a result of renovations), but the mortgagor had not consented to the enforcement. While the mortgagee may therefore have avoided the CLA 1977, they would not, under current rules, have avoided the need to obtain a court order. While this may appear to require mortgagees to engage in court proceedings that may inevitably lead to possession, as Dixon notes, ‘while this might be thought to require the lender to engage in unnecessary costs and to use precious court time, if the premises are truly abandoned then the order will be a formality and relatively cheaply obtained’.<sup>114</sup>

### **(b) Non-academic sources**

The lack of knowledge regarding the true extent of section 126 is not only apparent within academic writing but also in government reports and Parliamentary debates. This includes a consultation paper published by the Ministry of Justice (MoJ) in 2009,<sup>115</sup> and private members bills such as that proposed by Andrew Dinsmore MP.<sup>116</sup> The MoJ proposed that mortgagees should be required to seek approval of the court before exercising the power of sale in relation to residential owner-occupied property. It would seem, therefore, that the MoJ also considered that section 126 did not apply to the exercise of the power of sale by mortgagees under a RMC. However, in its consultation paper it said, ‘the paper is not concerned with and does not comment on the regulatory framework of the lending industry or the rules made by regulators. Nor does it address the effect of the Consumer Credit Acts’.<sup>117</sup> Had it considered the ambit of the CCA 1974 then perhaps it might have noted the applicability of section 126 to RMCs.

Despite the omission of section 126 from so many credible sources, other publications do state explicitly that a court order is required, although some misrepresent the difference between the mortgagor consenting to the enforcement and no longer occupying the property. The housing charity Shelter, for example, notes that, ‘Where the property is residential and occupied, the lender is required to obtain a court order to take possession’.<sup>118</sup> National Debtline is another, although its advice appears a little more nuanced, ‘You cannot be evicted from your home without a court order. If you have left your home voluntarily, your lender might be able to take over the house and sell it without going to court first’.<sup>119</sup> Edwards, Duthie, Shamash Solicitors are a little more precise, ‘In most cases a landlord or mortgage lender must apply to court for a Possession Order before the property can be lawfully repossessed’.<sup>120</sup> Unfortunately, none of these sources cite the legal provision which imposes such a requirement.

## **4. The implications of recognising the true extent of section 126**

### **(a) Substantive law**

One of the implications arising from our finding that section 126 applies more widely than many seem to appreciate includes the need to alter accounts of the substantive law. In particular, it should be made

<sup>114</sup>MJ Dixon ‘Editor’s notebook’ (2010) March/April 2 Conv 111 at 114.

<sup>115</sup>Ministry of Justice, above n 15.

<sup>116</sup>He proposed a Ten-Minute Rule ‘Home Repossession (Protection) Bill’, see Hansard HC Deb, vol 487, col 702, 3 February 2009.

<sup>117</sup>Ministry of Justice, above n 15, p 6, para 3.

<sup>118</sup>Shelter ‘Legal framework for mortgage arrears repossession’ available at [https://england.shelter.org.uk/professional\\_resources/legal/possession\\_and\\_eviction/mortgage\\_possession\\_proceedings/legal\\_framework\\_for\\_mortgage\\_arrears\\_repossession#title-0](https://england.shelter.org.uk/professional_resources/legal/possession_and_eviction/mortgage_possession_proceedings/legal_framework_for_mortgage_arrears_repossession#title-0).

<sup>119</sup>National Debtline ‘Mortgage Arrears’ available at <https://www.nationaldebtline.org/fact-sheet-library/mortgage-arrears-ew/>.

<sup>120</sup>Edwards, Duthie, Shamash Solicitors available at <https://edwardsduthieshamash.co.uk/legal-services/housing-and-social-welfare/repossession-and-eviction/>.

clear that *Ropaigealach* and *Horsham* were, in respect of agreements of any value covered by the CCA 1974, reversed (at least in part) in 2008 (albeit by statutory instrument). As regards *Ropaigealach* it is clear that in cases where the mortgagee has taken or intends to take possession,<sup>121</sup> the mortgagee is not entitled to do so without a court order unless the mortgagor consents. As regards *Horsham*, while section 126 does not require a mortgagee to obtain possession before seeking to sell the property, it does require a court order in respect of the sale. Scholarly textbooks and undergraduate courses that offer an account of the law of mortgage will therefore have to be revised to include reference to section 126, explaining the types of agreements covered by it (ie virtually all modern residential mortgage agreements) and the provisions of the CCA 1974 applicable to them. In particular, it is no longer correct to claim that most mortgagees seek possession through the courts due to the risk of sanctions arising under the CLA 1977. Rather, most are obliged to do so by virtue of section 126. An update to academic, practitioner and judicial knowledge is therefore needed, which is no mean feat given the numerous accounts that fail to reflect the true ambit of section 126.

As regards the practice of mortgage possession, the effect would be to require amendment of the standard particulars of claim for mortgage possession to include as relief a declaration that the lender was entitled to sell, and perhaps a requirement that a money judgment be sought (assuming that keeping the money from the sale constitutes ‘enforcement’) thereby preventing the need for multiple court orders for each type of ‘enforcement’.

### **(b) Retrospective breaches**

The first point to note when considering the impact of our finding on those who have been subject to the enforcement of a mortgage in contravention of section 126 is that we simply do not and cannot know how many RMCs have been enforced since 2008 without a court order. While the assumption appears to be that most if not all providers of RMCs will have sought a court order for possession,<sup>122</sup> no such assumption is made in respect of sale or the appointment of receivers. *Ropaigealach* and *Horsham* offer evidence of the latter remedies being exercised without a court order. However, in response to *Horsham*, the Council of Mortgage Lenders (CML, now known as UK Finance) issued in 2008 what McAuslan described as an ‘anodyne statement’,<sup>123</sup> indicating that its members ‘will not seek to sell a mortgaged property when the borrower is in default without first obtaining a court order for possession’.<sup>124</sup> This applied only to members of the CML and it did not have the force of law.<sup>125</sup>

Given the lack of knowledge of section 126 evident within both academia and legal practice, it seems unlikely that mortgagors whose home was subject to repossession, sale, or the appointment of a receiver would have had sufficient knowledge to challenge the lack of court proceedings. We can assume therefore that a significant number of agreements have been enforced in contravention of section 126. The question arises as to what consequences might flow from this. There is some evidence to suggest that those consequences would be insignificant.

For those mortgagors who might wish to challenge non-compliance with section 126 retrospectively, it seems likely that the outcome will be of little use. By virtue of the CCA 1974, there are no sanctions for non-compliance with section 126. However, as the FCA points out, ‘although the CCA does not provide a sanction for breach of this provision, noncompliance by a creditor could

<sup>121</sup>On the facts of *Ropaigealach* it was questionable whether the mortgagee had actually taken possession of the property before selling it, but the court was willing to decide the question of law as to whether a mortgagee was entitled to take possession without a court order.

<sup>122</sup>See for example the Law Commission, above n 30, p 103, para 3.69(a).

<sup>123</sup>P McAuslan ‘Whose mortgage is it anyway? Producers, consumers and the law in the UK mortgage market’ (2009) available at [https://sas-space.sas.ac.uk/3422/1/McAuslan%2C\\_Patrick\\_-The\\_Reform\\_of\\_Mortgage\\_Law3.pdf](https://sas-space.sas.ac.uk/3422/1/McAuslan%2C_Patrick_-The_Reform_of_Mortgage_Law3.pdf).

<sup>124</sup>Council of Mortgage Lenders ‘CML voluntary statement on s 101 of the Law of Property Act 1925 following the *Horsham Properties v Clark and Beech* case’ (15 December 2008).

<sup>125</sup>*Ibid.* See also Dixon, above n 114, at 112.

attract our disciplinary sanctions. The debtor could also seek an injunction to restrain enforcement'.<sup>126</sup> It is the latter that could offer some mortgagors an opportunity to prevent enforcement but obviously this will be of little use to those where enforcement has already been effected. On this point there is one case that is instructive. In *Waterside Finance Ltd v Ashraf Karim*,<sup>127</sup> the mortgagor sought an injunction to prevent completion of the sale of the mortgaged property by the mortgagee due to the failure to comply with section 126. Here, receivers had been appointed and had sold the property at auction, all without a court order.

Norris J held that, assuming the agreement was covered by the CCA 1974 and that the appointment of receivers was 'enforcement' of the mortgage, the action taken by the mortgagee was in breach of section 126. However, the court was not willing to grant an injunction to prevent the inevitable enforcement of the mortgage,

They [the mortgagors] have stood by and allowed the appointment of LPA receivers, they have allowed the property to go to auction and they have allowed a memorandum of sale to be entered into and a purchaser to contract to buy the property. It is, I think, now far too late to say that the sale can be prevented....<sup>128</sup>

This outcome was perhaps dependent on its facts (involving for example a short-term loan at a high rate of interest and a failure by the borrowers to apply for an injunction until contracts had been exchanged) but it seems apparent that mortgagors who have already lost their homes without the supervision of the court may find it difficult to benefit from a finding that the enforcement of the mortgage was in contravention of section 126.

### **(c) Current and prospective breaches**

While ignorance of the law is no excuse, it is possible to argue that, in most cases, given the disproportionate protection afforded to the rights and remedies of mortgagees, if the court was asked, it would permit enforcement or reject injunctive relief provided that the mortgagee's right or remedy had arisen. As Briggs J indicated in *Horsham*, 'any deprivation of possession constituted by the exercise by a mortgagee of its powers under section 101 of the Law of Property Act after a relevant default by the mortgagor is justified in the public interest'.<sup>129</sup> The reason for this view derives from the need to encourage mortgagees to continue to lend; as Dixon explains, 'mortgage lending in this country is relatively cheap, efficient and available partly because mortgagee's remedies are so powerful and thus the risk of non-recovery relatively low'.<sup>130</sup>

This lays any argument for the strict observance of section 126 open to the criticism that it would serve simply as a costly procedural hoop through which mortgagees would have to jump. For mortgagors in financial difficulties and unable to meet their mortgage payments, the addition of 'rubber stamping' court proceedings would simply delay the inevitable and add to their debt. For providers of RMCs, it would inevitably increase the resources needed to manage the court claims although they should, of course, already be involved in such procedures given the FCA's rules.<sup>131</sup> The impact on the court system could also be overwhelming given the backlog in the number of possession claims following the lifting of the moratorium on possession claims imposed during the Covid-19 pandemic.<sup>132</sup>

<sup>126</sup>Financial Conduct Authority, above n 92, para 2.07.

<sup>127</sup>[2012] EWHC 2999 (Ch).

<sup>128</sup>Ibid, [24].

<sup>129</sup>*Horsham Properties Group Ltd v Clark* [2008] EWHC 2327 (Ch) at [44].

<sup>130</sup>Dixon, above n 114, at 116.

<sup>131</sup>PERG 4.17.2.

<sup>132</sup>Judge, for example, estimates that 'over 750,000 families were behind with their housing payments in January 2021, 300,000 of which contained dependent children': see L Judge *Getting Ahead on Falling Behind Tackling the UK's Building*



While these potential financial and resource implications could be significant, they should not be sufficient to justify non-compliance with the law. The question therefore becomes, do the benefits of section 126 outweigh these burdens?

## 5. The justifications for observing section 126

Whatever the substantive outcome of proceedings brought in relation to section 126, its symbolic importance should not be overlooked. State and/or judicial oversight of the ‘deprivation of property’<sup>133</sup> is an important feature of a just system.<sup>134</sup> This seems particularly resonant within the inherently unequal relationship between creditor and debtor,<sup>135</sup> and where the property being taken is the mortgagor’s ‘home’.<sup>136</sup> As Dixon argues in relation to requiring a mortgagee to seek a court order for apparently abandoned properties, it ‘... is probably a price worth paying in order to meet the unusual case of apparently abandoned premises, which, in the borrower’s mind, still constitute their home’.<sup>137</sup>

There exists also a substantive reason why section 126 should be observed, and that relates to its potential to assist a household in avoiding the loss of their home by allowing them (where possession, sale or the appointment of a receiver is sought) the opportunity to raise a time order argument,<sup>138</sup> or (where possession is sought) to receive a suspended possession order under section 36 of the AJA 1970. According to section 126, a mortgagee is required to seek a court order to enforce the mortgage but no guidance is given regarding what powers are afforded to the court. The implication must be that, once before the court, powers arising under other legislation become available.

In relation to a claim for possession, this would activate the court’s discretion under section 36 of the AJA 1970 or section 129 of the CCA 1974, both of which allow the court to delay possession on payment terms. However, as was the case in *Horsham*, if the mortgagee skips possession and goes straight for sale, the AJA 1970 is not activated. Instead, the court can look to section 129 of the CCA 1974 which applies to, ‘an action brought by a creditor or owner to enforce a regulated agreement or any security, or recover possession of any goods or land to which a regulated agreement relates’. By virtue of section 129(2) of the CCA 1974, if the court considers it just, it can order the debtor to pay ‘any sum owed under a regulated agreement... by such instalments, payable at such times, as the court, having regard to the means of the debtor... considers reasonable’. In addition, the court may also, by virtue of section 136 of the CCA 1974, tag on to a time order ‘such provision as it considers just for amending any agreement or security in consequence of a term of the order’. The argument is that, had the defendants in *Ropaigealach* and *Horsham* been made aware of the mortgagee’s intention to

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*Arrears Crisis* (Resolution Foundation Briefing, February 2021) p 3. See also W Wilson et al ‘Mortgage arrears and repossessions (England)’ *House of Commons Library Briefing Paper* No 04769, 12 February 2021, available at <https://commonslibrary.parliament.uk/research-briefings/sn04769/>.

<sup>133</sup>According to Art 1 of Protocol No 1 to the European Convention on Human Rights, ‘No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law’. It was held in *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327 (Ch) that the sale of mortgaged property without first obtaining possession or an order of the court was not in contravention of Art 1.

<sup>134</sup>Dixon, for example, raised the question of whether advocates might argue that ‘losing possession of the family home without the authority of a court amounts to a violation of the right to family life guaranteed by the European Convention on Human Rights...’: see M Dixon ‘Sorry, we’ve sold your home: mortgagees and their possessory rights’ (1999) 58(2) *Cambridge Law Journal* 281 at 283.

<sup>135</sup>MA Fineman ‘Fineman on vulnerability and law’ (30 November 2015) *New Legal Realism Conversations: Seeking to Develop a Rigorous, Genuinely Interdisciplinary Approach to the Empirical Study of Law* available at <https://newlegalrealism.wordpress.com/2015/11/>.

<sup>136</sup>See, for example, SJ Bright ‘Dispossession for arrears: the weight of home in English law’ and L Fox O’Mahony and JA Sweeney ‘Re-thinking responses to displacement and dispossession’ both in L Fox O’Mahony and JA Sweeney (eds) *The Idea of Home in Law: Displacement and Dispossession* (London: Ashgate, 2011) at p 13 and p 223 respectively; L Fox *Conceptualising Home: Theories, Law and Policies* (Oxford: Hart Publishing, 2007).

<sup>137</sup>Dixon, above n 114, at 114.

<sup>138</sup>For the applicability of the time order process to RMCs see L Whitehouse ‘Mortgage possession at a crossroads: which way should we turn?’ (2019) 83(3) *Conv* 223.

repossess or sell their property then perhaps they could have convinced the court to delay or prevent the enforcement of the mortgage.

Any claim by mortgagees that the strict observance of section 126 would undermine their security is rejected by Dixon who notes, in relation to the MoJ's 'modest proposals'<sup>139</sup> to require a court order where possession and/or sale is sought, that they 'would not compromise the security of mortgages to any great degree...'.<sup>140</sup> The reason for this is due to the fact that even if mortgagors do defend against possession or sale, the mortgagee's security remains safe given that the mortgagor will be required to maintain payments.

The retention and observance of section 126 therefore seems justified, a view supported by the FCA: 'Our view is that [section 126] should be retained in the CCA or other legislation because its repeal would adversely affect the appropriate degree of consumer protection'.<sup>141</sup> While the Treasury are consulting on reforming the CCA 1974, it seems unlikely that they will impose sanctions where none already exist but the hope is that they will at least retain the requirement to obtain a court order while simplifying the manner in which it is expressed.<sup>142</sup>

## Conclusions

We wrote this paper with a degree of trepidation. Having taught and practised in the area for many years we gradually started to notice that others were surprised when we mentioned the requirement placed on many mortgagees to seek a court order, particularly for possession. Having researched the issue in more depth we found it difficult to believe that experts in the field were unaware of the ambit of section 126 but it is clear that knowledge of the law in this area is inconsistent. While the FCA makes it clear that section 126 applies to the enforcement of RMCs, the MoJ proposed that a court order should be necessary before the power of sale is exercised.<sup>143</sup> Most scholarly textbooks do not make the link between section 126 and RMCs and so continue to claim that a court order is not necessary to enforce the vast majority of mortgage agreements, while other academics claim the opposite.<sup>144</sup> Regardless of the strength of the arguments for its application in practice, we should at least expect consistency in accounts that seek to explain it. However, improving knowledge of section 126 is more than merely academic, for it has the potential to assist some households in avoiding the loss of their home.

This is particularly the case following the reduction in legal aid provision by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). As Clarke, McConnell and Mullings note in respect of housing practitioners post-LASPO,

One consequence of the reduction in day-to-day mortgage work appears to be that knowledge in this area of law is also dropping off. Important developments in the law since LASPO appear, anecdotally, to have been missed by practitioners, perhaps because they are no longer doing this work on a regular basis.<sup>145</sup>

The importance of improving knowledge of and ensuring compliance with section 126 has been enhanced by the adverse impact of the Covid-19 pandemic on household finances, coupled with the potential impact of the 'cost of living crisis' and the substantial backlog of possession claims

<sup>139</sup>Dixon, above n 114, at 116.

<sup>140</sup>Ibid, at 116.

<sup>141</sup>Financial Conduct Authority, above n 92, para 2.08.

<sup>142</sup>HM Treasury, above n 9.

<sup>143</sup>Ministry of Justice, above n 15.

<sup>144</sup>Kenna and Lynch-Shally, above n 95, at 303.

<sup>145</sup>Clarke et al, above n 22.

awaiting a court hearing. Given the median average time from claim to mortgage repossession increased from 37 weeks in 2019,<sup>146</sup> to 64 weeks in 2022,<sup>147</sup> less reputable lenders may be tempted to encourage a mortgagor to ‘voluntarily’ abandon their home or to enforce the mortgage without a court order. It is imperative therefore that these mortgagors are advised of the need by the mortgagee to obtain a court order and the potential this holds for them in avoiding the loss of their home. Our hope is that this paper will assist in this respect by, to echo Clarke LJ’s words, once and for all making the operation of section 126 comprehensible to layman and lawyer alike.

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<sup>146</sup>Ministry of Justice ‘Mortgage and Landlord Possession Statistics in England and Wales, October to December 2019’, 13 February 2020, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/865192/Mortgage\\_and\\_Landlord\\_Possession\\_Statistics\\_Oct\\_to\\_Dec\\_2019\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/865192/Mortgage_and_Landlord_Possession_Statistics_Oct_to_Dec_2019_.pdf).

<sup>147</sup>Ministry of Justice, above n 28.

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