

## Repossessing residential property in Scotland (including commercial property containing residential units)

### > A summary of the new rules and guidelines in force from 30 September 2010

This is a summary of the new rules, procedures and guidelines that require to be followed by creditors in Scotland seeking to repossess property used to any extent for residential purposes. It will take time for the courts to develop a consistent and coherent practice when dealing with such matters so, at least initially, practices will differ from court to court.

#### 1 Introduction

##### 1.1 *New legislation in force from 30 September 2010*

- 1.1.1 The Scottish Government has introduced new legislation, The Home Owner and Debtor Protection (Scotland) Act 2010 (the Act), in response to the economic downturn, consequential rise in repossessions and need to provide additional debtor protection where there is a risk of repossession of a family home. The provisions of the Act relating to voluntary and hostile repossession proceedings came into force on 30 September 2010.
- 1.1.2 Those provisions are designed to give similar protection to that offered in England by the non-statutory Pre-Action Protocol for Possession Claims based in Mortgage or Home Purchase Plan Arrears. The Act goes beyond the pre-action protocol in England and cannot be avoided by creditors.
- 1.1.3 The provisions apply to residential property situated in Scotland and also commercial property where that contains a residential element, for example a buy-to-let portfolio or a public bar with landlord's accommodation.

##### 1.2 *Purpose of Act*

- 1.2.1 The purpose of the Act is to ensure that:-
  - repossession proceedings are a last resort for creditors;
  - all repossession cases must call in court, except in cases of voluntary surrender (which require written confirmation that the surrender was voluntary);
  - strict pre-action requirements must be complied with by creditors, requiring them to provide the debtor with information, take reasonable steps to avoid repossessions occurring and refrain from taking repossession proceedings in certain circumstances;

- certain residents other than the debtor (entitled residents) can make representations to a court which is considering a repossession application;
- a debtor, entitled resident or creditor has an automatic right to seek recall of a default judgment;
- representatives of recognised advice agencies, such as the Citizens Advice Bureau, can represent debtors and entitled residents.

### 1.3 *Applicability of Act to private individuals and commercial entities*

- 1.3.1 The Act applies to homes owned by private individuals and commercially-owned properties which are let as residential homes or which include residential accommodation.
- 1.3.2 Creditors will require to demonstrate that debtors, whether private individuals or commercial entities, have been given proper assistance to resolve a default before any action is taken to repossess a property which is used to any extent for residential purposes.

## **2 New requirements for *voluntary* surrender of property used to any extent for residential purposes**

- 2.1 A court action need not be raised if a private individual or commercial entity agrees in writing that the property in issue can be repossessed.
- 2.2 Before a property can be voluntarily surrendered:-
- the security subjects must be unoccupied; and
  - the debtor and other entitled residents must have in writing:-
    - certified that they do not occupy the security subjects and are not aware of the security subjects being occupied by any other person;
    - consented to the exercise by the creditor of the creditor's rights on default; and
    - certified that their consent is freely given and without coercion of any kind.
- 2.3 The entitled residents may be:-
- the proprietor of the security subjects where the proprietor is not the debtor;
  - the non-entitled spouse of the debtor or the proprietor of security subjects which are, in whole or in part, a matrimonial home;
  - a civil partner of the debtor or the proprietor of security subjects;

- cohabitants in terms of section 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (occupancy rights of cohabiting couples).

2.4 The security subjects must not be repossessed until the above is confirmed in writing. An application for repossession will require to be made if the above cannot be obtained in writing.

### 3 Essential court test for repossession of residential property

3.1 A court may only grant a repossession application if it is satisfied that the prescribed pre-action requirements have been complied with and that it is reasonable in the circumstances of the case to grant the application.

### 4 Five pre-action requirements which must be complied with by creditors

4.1 *Requirement to provide information about the default as soon reasonably practicable*

4.1.1 The creditor must, as soon as it is reasonably practicable to do so, provide the debtor with clear information as possible about: -

- the terms of the standard security;
  - There is no guidance on what precise information must be given about the terms of the standard security. Information should be given about the main terms of the standard security. Those include:-
    - details of the parties to the standard security, including details of the debtor who granted it, the lender of which it is in favour and of any assignation of the standard security. The date of the standard security and any assignation should be provided;
    - the amount secured by the standard security, or if the amount is variable, that the security secures all sums due or to become due by the debtor to the creditor;
    - the property which is subject to the standard security;
    - details of any conditions or deeds which are included in and form part of the standard security;
    - that the creditor may be, or become, entitled to enforce the standard security and take possession of or sell the property if the debtor does not take action to remedy a default.
    - that the standard security is governed by and construed in accordance with Scottish law.
  - the amount due to the creditor, including any arrears and any charges in respect of late payment, broken down to show:-
    - the total amount of the arrears; and
    - the total outstanding amount due including any charges already incurred.

- the nature and the level of charges that may be incurred by virtue of the contract to which the security relates if the default is not remedied (i.e. a summary of all contractual charges that may be incurred for late payment)
  - any other obligation under the security in respect of which the defender is in default.
- 4.1.2 The charges are not to include any redemption charges, nor, where a standard security is involved, expenses recoverable under standard condition 12 such as legal costs, asset management/estate agency fees, repossession and conveyancing charges on default.
- 4.1.3 The creditor will require to provide evidence to the court that the above information was provided and the date on which that was done.
- 4.1.4 A copy of all of the correspondence and documentation sent to the debtor with the information will require to be lodged in court.
- 4.1.5 To ensure that clear information is provided, the creditor must adhere to the following guidelines:-
- Creditors must ensure that the information provided to the debtor is clear, not misleading and easily understandable. Standard correspondence should be written in plain English;
  - Creditors should have regard to any known difficulties which the debtor may have in reading and understanding;
  - Creditors should also make an effort to ensure that information is communicated to the debtor in a language he or she can readily understand;
  - It would be prudent to invite a debtor to arrange a telephone consultation or a meeting to discuss any enquiry they may have.
- 4.1.6 To ensure that information is provided as soon as is reasonably practicable, the creditor must adhere to the following guidelines:-
- The information is to be provided to the debtor as soon as is reasonably practicable upon the debtor entering into default.
  - The information should be communicated in writing and sent to the debtor as soon as they have defaulted on a payment.
- 4.1.7 It will be important to be able to prove in court when a letter was sent to a debtor setting out all of the prescribed information. It would be prudent to send that letter by recorded delivery post and to attempt a telephone call to the debtor to confirm that they had received the letter. It would also be sensible to refer to the letter and to any attempted telephone call in any subsequent correspondence with the debtor.

#### 4.2 *Requirement to make reasonable efforts to agree a proposal*

- 4.2.1 The creditor must make reasonable efforts to agree with the debtor proposals for future payments under the standard security and the fulfillment of any other obligation under the security in respect of which the debtor is in default.
- 4.2.2 Contact should include written contact, although this need not solely be in writing. If creditors do not receive any response from the debtor to letters, attempts to contact the debtor should be made by telephone or email.
- 4.2.3 Creditors should record each attempt made to contact the debtor and detail the method used - for example, letter, telephone or email.
- 4.2.4 Creditors should avoid undue pressure through excessive attempts to contact the debtor. They should not harass the debtor nor exert any undue pressure on the debtor to agree to any particular proposal.
- 4.2.5 No attempt should be made to contact the debtor by telephone after 9pm or before 8am. Such attempts should also have regard to the debtor's circumstances, if known, such as a particular work pattern or religious faith.
- 4.2.6 Any proposal made by the creditor to the debtor should be set out in such a way as to allow the debtor to consider the proposal. The following rules and guidance require to be followed:-
- The proposals should be clearly communicated in writing with sufficient detail. Where the proposal is for arrangements relating to repayment, the creditor should ensure that the proposal details:-
    - how much is to be paid and the frequency of payments;
    - when the arrangement will commence; and
    - the duration of the agreement.
  - The debtor should be allowed a reasonable time to consider any proposal made by the creditor:-
    - The creditor should have regard to the debtor's known circumstances and give the debtor sufficient time to consider and make a response or counter-proposal.
    - The creditor should notify the debtor of the length of time the debtor has to consider the proposal.
  - Proposals by either the debtor or creditor may include:-
    - to change the date of regular payment of amounts due under the loan contract;

- to change the method by which payments due under the security are made (for example, from direct debit to standing order);
- to extend the repayment period;
- to change the type of repayment under the security agreement (for example, from capital and interest to interest only);
- to defer payment of interest due under the security agreement;
- to capitalise the arrears due under the security.

4.2.7 The creditor must notify the debtor within a reasonable time of any decision taken by the creditor to accept or reject a proposal made by the debtor.

4.2.8 A creditor must deal with every case on its own terms. A blanket policy should not be adopted. What is reasonable will depend on the circumstances of each case. A creditor must consider the affordability of any proposal to the debtor, taking into account, where known to the creditor, the debtor's personal and financial circumstances.

4.2.9 A creditor can accept a proposal by the debtor over the telephone immediately if that is considered reasonable.

4.2.10 If a proposal made by a debtor is rejected, the creditor **must** provide the debtor with clear reasons, in writing, **within 10 working days**, as to why the creditor was unable to accept the proposal.

4.2.11 If an agreement is made with a debtor and the debtor fails to comply with any condition of it for the first time, the creditor must comply with the following rules before an application can be made to the court to repossess the property:-

- The creditor must give the debtor notice in writing of the decision to make an application to the court to repossess the property and of the ground of the proposed application;
- The creditor must not make an application **before the expiry of 15 working days** (beginning with the date on which the debtor is deemed to have received the notice of the intention to make an application to the court) nor if the default is remedied within that period.
- The 15-day period begins when the debtor can be expected to have actually received the notice, bearing in mind that Saturdays, Sundays and local bank holidays are not working days.

4.3 *Requirement not to take action if debtor is taking steps which are likely to result in payment within a reasonable time*

- 4.3.1 The creditor must refrain from making an application to the court if the debtor is taking steps likely to result, within a reasonable period, in payment of arrears or principal sum and to comply with any other obligation for which the debtor is in default.
- 4.3.2 Those steps will include providing documentary evidence to the creditor:-
- of any claim made to an insurer under a mortgage payment protection policy, which has a reasonable expectation of eligibility for payment.
  - An application for possession by the creditor will be competent if the debtor is unable to meet the shortfall not covered by the mortgage payment protection policy.
  - of an application made to a support scheme run by Scottish Ministers or the United Kingdom Government and that the debtor has a reasonable expectation of being eligible for support.
  - The creditor need only consider applications to schemes in which they are participating.
  - An application for possession by the creditor will be competent if the debtor is unable to meet the shortfall not covered by the mortgage support scheme, or if the mortgage support application is not decided within a reasonable time.
  - of the property being actively marketed for sale. The documentary evidence provided by the debtor should demonstrate that:-
    - the property is being marketed at an appropriate price;
    - professional advice was sought when setting the price, including that of a solicitor, estate agent or chartered surveyor. A copy of the Home Report and other documents required by sections 98, 99(1) and 101(2) of the Housing (Scotland) Act 2006 must be provided where appropriate.
- 4.3.3 The creditor has the right to make a court application, despite the debtor demonstrating that the property is being marketed for sale, if:-
- the debtor rejects a reasonable offer to purchase the property;
  - the property does not sell within a reasonable time;
  - the debtor refuses to provide the creditor with details of any agent acting for him or her in relation to the marketing or sale of the property or to authorise any such agent to communicate with the creditor, in order to enable the creditor to ascertain whether the debtor has rejected reasonable offers or that the property has not sold within a reasonable time; and

- upon examination of the documentary evidence provided by the debtor, the creditor is not satisfied that any steps can be taken which may result in repayment or the default being remedied within a reasonable time.

#### 4.4 *Requirement to provide information about sources of advice and assistance*

- 4.4.1 The creditor must provide the debtor with information about sources of advice and assistance in relation to management of debt.
- 4.4.2 Where the security is regulated, that information must include any relevant information sheet produced by the regulatory body. It must also include details of a citizens bureau or other advice organisation as well as details of the housing department of the local authority in whose area the secured property is situated.

#### 4.5 *Requirement to encourage debtor to seek assistance from local authority*

- 4.5.1 The creditor must encourage the debtor to contact the local authority in whose area the property is situated.

## **5 Matters which court must assess when determining if a repossession application is reasonable in the circumstances**

5.1 A court must have regard to the following matters when considering a repossession application:-

- The nature of and the reasons for the default;
- The ability of the debtor to fulfill, within a reasonable time, the obligations under the standard security;
- Any action taken by the creditor to assist the debtor to fulfill those obligations;
- Where appropriate, participation by the debtor in a Debt Payment Programme approved under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002; and
- The ability of the debtor and any other person residing at the security subjects to secure reasonable alternative accommodation.

5.2 A creditor should take all of these matters into account when assessing any proposal made by a debtor or an entitled resident.

## **6 Transitional arrangements**

6.1 Where an application has been made to court before 30 September 2010 the new rules and guidance do not apply.

6.2 If a calling-up notice or notice of default has been served before 30 September 2010 but a court application has not been made, the provisions of the Act will apply and the procedure for court applications introduced by the Act must be followed.

6.3 If the default occurred before 30 September 2010, a creditor must provide the debtor the prescribed pre-action information as soon as reasonably practicable.

## 7 Guarantor notification unaffected by Act

7.1 The Act does not impose any new notification requirements on creditors in respect of guarantors.

7.2 A creditor should, of course, ensure that any required contractual notice is given to a guarantor if the debtor acts in default.

7.3 A creditor is not to put any undue pressure on a debtor following a default. It is therefore prudent that a creditor assesses whether any early notification of a debtor's default given to a guarantor (i.e. notice given prior to any contractual notice) might result in undue pressure being put on a debtor. Such early notice should be avoided in that event.

## 8 Instructing solicitors

8.1 A creditor will require to provide its solicitors with full details of how the pre-action requirements were complied with, including a copy of all correspondence and documentation sent to, and received from, a debtor and any entitled resident, and why the repossession action is reasonable in all of the circumstances.

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