

**HOME OWNER AND DEBTOR
PROTECTION (SCOTLAND) ACT 2010**

**GUIDANCE ON PRE-ACTION
REQUIREMENTS FOR CREDITORS**

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Introduction

1. This guidance relates specifically to the requirements under section 24(A) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (“the 1970 Act”) and section 5B of the Heritable Securities (Scotland) Act 1894 (“the 1894 Act”), and the accompanying The Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010 (“the Order”), which set out the pre-action requirements which creditors must satisfy before making an application in relation to a residential property either under section 24(1B) of 1970 Act to exercise their remedies on default, or under section 5 of the 1894 Act.
2. In early 2009, in response to the economic downturn and consequent rise in repossessions, the Scottish Government convened a Repossessions Group, as a sub-group of the Debt Action Forum, to consider whether protection for Scottish home owners facing repossession was sufficient. Members of the Group represented a wide range of interested parties, including representatives from the Council of Mortgage Lenders, the Finance and Leasing Association, the Scottish Law Commission, Shelter, Citizens Advice Scotland and the Scottish Legal Aid Board. The Group made a number of recommendations to strengthen protection for home owners, which were taken forward through Part 1 of the Home Owner and Debtor Protection (Scotland) Act 2010, to:
 - require all repossession cases to call in court;
 - require lenders to demonstrate to the court that they have considered reasonable alternatives to repossession; and
 - enable home owners to be represented in court by approved lay representatives.
3. Paragraphs 6.26 to 6.30 of the Repossessions Group Final Report, published in June 2009¹, recommended that before bringing an action for repossession, lenders must be required to satisfy the court that they have considered reasonable alternatives to repossession by meeting certain pre-action requirements intended to help and advise home owners. This would give Scottish borrowers protection on a statutory basis, similar to protection offered south of the border by the non-statutory Pre-Action Protocol for Possession Claims based in Mortgage or Home Purchase Plan Arrears², which came into effect on 19 November 2008 in England and Wales.
4. Section 24A(2) to (6) of the 1970 Act and section 5B(2) to (6) of the 1894 Act contain the pre-action requirements that a creditor must comply with before making an application for possession. The requirements are to:

¹ <http://www.scotland.gov.uk/Publications/2009/06/08164837/0>

² Pre-Action Protocol for Possession Claims based in Mortgage or Home Purchase Plan Arrears
http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_mha.htm

- Provide clear information about the terms of the security, the amount due including any arrears, and any other obligations under the security in respect of which the debtor is in default
 - Make reasonable efforts to agree, with the debtor, proposals for future payments under the security and the fulfilment of any other obligation in respect of which the debtor is in default
 - Not make a court application seeking repossession or sale where the debtor is taking steps likely to result within a reasonable period of the payment of any arrears or the whole amount due under the security, and fulfilment of any other obligation in respect of which the debtor is in default
 - Provide the debtor with information about sources of advice and assistance to help the debtor manage their debts
 - Encourage the debtor to contact the local authority where the property is located (so that, for example, the council may offer advice and its homelessness services, can be ready to provide assistance in the event that the repossession action goes ahead).
5. Further provision about these requirements is set out in secondary legislation, and the purpose of this guidance is to assist creditors in complying with these requirements.
 6. This guidance is not a substitute for, and should be read alongside, any guidance produced to aid lenders of regulated mortgages in meeting their obligations under treating customers fairly principles and in meeting regulatory requirements, such as Chapter 13 on Arrears and Repossessions of the Mortgages Conduct of Business Rules (MCOB 13) established by the Financial Services Authority (the FSA) pursuant to the statutory powers and duties vested in it by the Financial Services and Markets Act 2000.
 7. Relevant good practice and procedure examples may apply to creditors in complying with any relevant regulatory requirements as well as the statutory requirements discussed in this guidance.

Scope

8. This guidance is primarily aimed at creditors and their representatives to aid them in complying with the pre-action requirements. It should be noted that creditors have a statutory requirement to have regard to the guidance, in section 24A(7) of 1970 Act and section 5B(7) of 1894 Act. However it may also be an appropriate resource for borrowers, the voluntary sector, lay representatives and solicitors.

Requirement to provide information about the default

9. Section 5B(2) of the 1894 Act and section 24A(2) of the 1970 Act require the creditor to provide **clear information** to the debtor detailing:

- (a) the terms of the security;
- (b) the amount due to the creditor under the security, including any arrears; and
- (c) any other obligation under the security in respect of which the debtor is in default.

10. Article 2(1) of the Order removes the requirement that information about the amount due include information about charges in respect of redemption. Article 2(2) details that in providing information to the debtor about the amount due to the creditor under the security, the creditor must specifically ensure that the debtor is provided with:

- (a) a statement of the total amount of the arrears;
- (b) a statement of the total outstanding amount due under the loan contract, including charges already incurred; and
- (c) a description of the nature and level of any charges that may be incurred by virtue of the loan contract if the default is not remedied, **excluding** any redemption charges, and 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.

11. It is recommended that creditors consider these requirements when developing procedures for compliance, records management etc. It is important to remember that creditors will have to confirm to the court, when making an application to exercise their remedies on default, that they have provided the debtor with this information and may be required to evidence their compliance at any eventual hearing.

Clear Information

12. In meeting the requirements of Section 5B(2) of the 1894 Act and 24A(2) of the 1970 Act creditors should ensure that the information provided to the debtor is **clear, not misleading** and **easily understandable**. It is recommended that creditors should ensure that standard correspondence is written in 'plain English'.

13. It is recommended that 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.

As soon as is reasonably practicable

14. Article 2(4) of the Order requires that the information required to be provided by the creditor by virtue of sections 5B(2) of 1894 Act and 24A(2) of 1970 Act be provided to the debtor as soon as is reasonably practicable upon the debtor entering into default. It is expected that this information should be communicated in writing and sent to the debtor as soon as they enter into default e.g. by falling into arrears.

Requirement to make reasonable efforts to agree proposals

15. It is in the interests of all parties if difficulties can be resolved without court action. The creditor is therefore required to make reasonable efforts to agree proposals with the debtor in relation to future payments or other obligations under the security to comply with Section 5B(3) of the 1894 Act and section 24A(3) of 1970 Act. In their efforts to come to an agreement with the debtor, as detailed in article 3(1) of the Order, creditors must:

(a) Make reasonable attempts to contact the debtor to discuss the default

16. The creditor must make reasonable attempts to contact the debtor to discuss the default. The method by which the creditor attempts to contact the debtor to agree proposals is not prescribed in the Act or secondary legislation. It is recommended that the method of contact should include written contact, although not solely be in writing. If one method of contacting the debtor is unsuccessful, the creditor should consider trying another method. For example, if no response is being received to letters sent, the creditor should try to contact the debtor by telephone or e-mail. The creditor should also consider, where possible, arranging a face to face meeting with the debtor to discuss any proposals.

17. Creditors will wish to bear in mind that they may have to demonstrate to the court at any eventual hearing that they have made reasonable attempts to contact the debtor, should an application be made for repossession. It is therefore recommended that creditors record each attempt made, and detail the method used, for example letter, telephone or e-mail.

18. Where use has been made of automated dialler, which do not necessarily keep an individual record of each attempted call, it is recommended that the creditor is able to confirm the number of attempts and frequency that the system is programmed to make.

Avoiding undue pressure

19. When attempting to contact the debtor, creditors should avoid undue pressure through excessive attempts. They should not harass the debtor,

nor should they exert any undue pressure on the debtor to agree to any particular proposal.

20. If contacting the debtor by telephone, the creditor should not make attempts at an unreasonable hour (after 9pm and before 8am). Furthermore, it is recommended that such attempts should also have regard to the borrower's circumstances, if known, such as work pattern or religious faith.

(b) Provide the debtor with details of any proposal made, set out in such a way as to allow them to consider it

21. To enable the debtor to understand and consider the implications of any proposal made by the creditor, such proposals should be clearly communicated, in sufficient detail, to the debtor. For example, where the proposal is for arrangements relating to repayment, the creditor should ensure that the proposal details the following:

- How much is to be paid and the frequency of payment;
- When the arrangement will commence; and
- The duration of the arrangement.

22. It is recommended that any **agreed** arrangement should be clearly set out **in writing** and provided to the debtor.

(c) Allow the debtor a reasonable time to consider any proposal made

23. The debtor should be given reasonable time to consider proposals. When assessing what is a reasonable time, the creditor should have regard to the individual debtor's circumstances.
24. It is recommended that the creditor clearly indicates the time period to the debtor for consideration of the proposal. When deciding what is a reasonable time, the creditor should factor in time for the debtor to seek independent advice, should the debtor consider it to be appropriate.
25. For all agreements, specifically those made over the telephone, it is suggested that good practice would be for the creditor to offer the debtor time to reconsider any proposal agreed when it is an agreement for a long term payment plan. However this should not necessarily prevent a creditor from taking a one off payment from the debtor over the telephone or otherwise.

Suggested proposals which could be made by the creditor

26. It is suggested that proposals, by either the debtor or creditor, may include one or more of the following:

(a) to change the date of regular payment of amounts due under the loan contract to which it relates;

- (b) to change the method by which payments of amounts due under the security are made (e.g. from direct debit to standing order);
- (c) to extend the repayment period;
- (d) to change the type of repayment under the security agreement (e.g. to interest only from repayment of capital and interest);
- (e) to defer payment of interest due under the security agreement; and
- (f) to capitalise the arrears on the security.

27. It is important that each case is considered on its own merits when a creditor is making proposals. It is recommended that creditors specifically consider the causes of the arrears or default, in particular whether these are temporary or long term, and tailor proposals to the circumstances of the individual. It is also recommended that creditors consider any decisions which have been made by Courts in relation to whether efforts to agree proposals have been reasonable.

d) Notifying the debtor within a reasonable time of any decision to accept or reject a proposal made by the debtor

28. In deciding whether to accept or reject a proposal, the creditor should take each customer's individual circumstances into account and assess each proposal on a case by case basis. It is recommended that creditors do not have a blanket policy for dealing with proposals, and they should bear in mind their obligations to treat all customers fairly.

29. The creditor should notify the debtor within a reasonable time whether their proposal has been accepted or rejected. It should be noted that what is reasonable will depend on the circumstances of the case and should not prevent the creditor accepting a proposal by the debtor over the telephone instantaneously.

30. Where the creditor is unable to accept a proposal made by the debtor, article 3(2) of the Order requires the creditor to also provide the debtor with reasons, in writing, within 10 working days of notifying the debtor that their proposal has been rejected. It is expected that these reasons be in 'Plain English' and explain clearly why the creditor was unable to accept the proposal.

Failure by a debtor to keep to an agreement

31. Article 3(3) of the Order provides that where an agreement is reached and the debtor fails to comply with it, then on the first occasion the creditor must not make an application to a court without giving the debtor written notice that the application will be made, and why. The court application must not be made for at least 15 working days, to give the debtor an opportunity to remedy the failure. (Creditors should note that the Order defines when the 15 day period begins, based on when the debtor can be expected to have received the notice, and that Saturdays, Sundays and bank holidays anywhere in the UK are not working days.) This limitation only applies to the first failure under the agreement.

Steps which are likely to result in payment etc. within a reasonable time

32. Section 5B(4) of the 1894 Act and section 24A(4) of 1970 Act detail that the creditor must not make an application to a court if the debtor is taking steps which are likely to result in payment etc. within a reasonable time. The Order lists, at Article 4(1), some steps which are likely to result in payment within a reasonable time, within the meaning of those sections. It is important to note that this is not an exhaustive list of such steps, and creditors must consider whether any other steps being taken by the debtor are likely to result in payment within a reasonable time.
33. It should be noted that the **debtor** is required to provide documentary evidence to the creditor to demonstrate that a listed step is being taken.
34. Upon examination of the documentary evidence, if satisfied that the step is being taken and unless one of the exceptions detailed in article 4(3) or 4(4) applies, the creditor must not commence an application.

- The steps which **are** listed in the Order as being likely to result in payment include:

Claim under a mortgage payment protection policy

35. If the debtor produces documentary evidence of a claim made to an insurer under a mortgage payment protection policy, which has a reasonable expectation of eligibility for payment, an application for possession must not be started.

Exception

36. However, 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, or if the insurance application is not decided within a reasonable time or is refused, as detailed in articles 4(3)(a) and 4(3)(b) respectively.

Application to Government mortgage support schemes

37. If the debtor can demonstrate in documentary evidence that an application to a mortgage support scheme has been submitted and that the debtor has a reasonable expectation of being eligible for support, an application for possession must not be started. It should be noted that the creditor need only consider applications to schemes in which they are participating. In such cases the debtor should pass a copy of any application to the lender and failure to do so could result in the creditor deeming that the step has not in fact been taken.

Exception

38. However, 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 or is refused, as detailed in articles 4(3)(a) and 4(3)(b) respectively. An application by the creditor for repossession will also be competent in cases where an application to the mortgage support scheme by the debtor is invalid, ineligible or does not meet the eligibility criteria.

Actively marketing the property

39. Article 4(1)(c) of the Order outlines that the creditor must not apply to a court for possession if the debtor provides documentary evidence that either the debtor or an agent acting for the debtor is actively marketing the property for sale.

40. The documentary evidence provided by the debtor should demonstrate that:

- the property is being marketed at an appropriate price; and
- professional advice was sought when setting the price.

Professional Advice will include that of a solicitor, estate agent or chartered surveyor.

41. In line with article 4(2), the documentary evidence must also include a copy of the Home Report and other documents required by sections 98, 99(1) and 101(2) of the Housing (Scotland) Act 2006, where appropriate.

Exception

42. However, as detailed in article 4(4), 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; or
- 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 the property has not sold within a reasonable time.

43. If upon examination of the documentary evidence provided by the debtor, the creditor is not satisfied that any of the steps in article 4(1), nor any

other steps which may result in repayment or the default being remedied within a reasonable time, are being taken, then the creditor may decide to proceed with a court application.

Sources of advice and assistance

44. Section 5B(5) of the 1894 Act and section 24A(5) of the 1970 Act require the creditor to provide the debtor with information about sources of advice and assistance to help the debtor manage their debts. Where the security is regulated, that information must include any relevant information sheet produced by the regulatory body. It must also include signposting to advice organisations, such as a citizens advice bureau, as well as to the local council's housing department.

Proceeding with a court application for possession

45. It should be noted that Scottish Ministers view an action for possession as the last resort. If the creditor chooses to make an application to the court, then the creditor must be prepared to demonstrate that they have complied with the pre-action requirements. It is recommended that the creditor has explored all other reasonable attempts to resolve the position before making the application.
46. If the creditor decides to proceed with an application for possession, the court will require completion of Form 11C or Form 59 (as appropriate), to certify completion of the pre-action requirements. (see Annex A)

Annex A – Form 11 C / Form 59

[Form to be agreed by Scottish Court Rules Council]



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