

EXECUTIVE NOTE

THE APPLICATIONS BY CREDITORS (PRE-ACTION REQUIREMENTS) (SCOTLAND) ORDER 2010 (S.S.I. 2010/DRAFT)

The above instrument is made in exercise of the powers conferred by section 24A(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (the 1970 Act) and section 5B(8) of the Heritable Securities (Scotland) Act 1894 (the 1894 Act). The instrument is subject to affirmative resolution procedure.

Policy Objectives

The purpose of the Applications by Creditors (Pre-Action Requirements) (Scotland) Order (“the Order”) is to make further provision about the pre-action requirements in Section 24A(2) to (6) of the 1970 Act and section 5B(2) to (6) of the 1894 Act. A creditor must comply with these requirements before making an application in respect of a residential property either under section 24(1B) of 1970 Act (for warrant to exercise their remedies on default), or section 5 of the 1894 Act (to eject a proprietor in personal occupation of the property).

The Order sets out in more detail the pre-action requirements on creditors in relation to:

- providing information to the debtor about the default
- making reasonable efforts to agree proposals with the debtor for addressing the default (to avoid the need for repossession action to be commenced)
- providing information to the debtor about sources of advice and assistance, and
- the steps considered likely to result in payment of any arrears within a reasonable time

Consultation

There was no statutory requirement to consult on this Order. However, the following bodies have been consulted during the preparation of the instrument, in working groups and by correspondence:

Aberdein Considine & Company Solicitors
Anderson Fyfe Solicitors
Building Societies Association
Castlemilk Law Centre
Citizens Advice Scotland
Consumer Focus
COSLA
Council of Mortgage Lenders
Dunfermline Building Society
Finance and Leasing Association
Homeloan Management Limited
Irwin Mitchell Solicitors

Law Society for Scotland
Lloyds Banking Group
McClure Naismith Solicitors
Money Advice Scotland
Nationwide Building Society
RBS
Scottish Court Service
Scottish Legal Aid Board
Shelter

Financial Effects

The instrument has no financial effects on the Scottish Executive or local government. Some additional costs may arise for creditors and others. However the pre-action requirements have been drafted taking account of the requirements applying on creditors across the UK to minimise any additional costs. The benefits of enhanced protection for those at risk of repossession outweigh any additional costs.

Further information on the benefits and costs is set out in a regulatory impact assessment of the Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010.

BUSINESS REGULATORY IMPACT ASSESSMENT

The Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010

1. Title of proposal

The Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010

2. Purpose and intended effect of proposals

2.1. Objective

The Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010 will:

- provide further detail of the precise requirements which creditors must satisfy before making an application for possession of a residential property either under section 24(1B) of 1970 Act to exercise their remedies on default, or section 5 of the 1894 Act.
- when read alongside Section 24A(2) to (6) of the 1970 Act and section 5B(2) to (6) of the 1894 Act, require lenders to show in court that they have considered every reasonable alternative before making an application for possession.

2.2. Background

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.

In particular 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 all reasonable alternatives to repossession by meeting certain pre-action requirements intended to help and advise home owners.

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

Section 24A(2) to (6) of the 1970 Act and section 5B(2) to (6) of the 1894 Act, as introduced by the Home Owner and Debtor Protection (Scotland) Act now require lenders to show in court that they have considered every reasonable alternative before making an application for possession. Section 24A(8) of the 1894 Act and section 5B(8) of the 1970 Act give Scottish Ministers power to make further provision about the pre-action requirements in secondary legislation.

This Business Regulatory Impact Assessment has been prepared to assess the costs and benefits of the proposed detail of pre-action requirements as set out in the Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010.

1. www.scotland.gov.uk/Resource/Doc/274765/0082205.pdf

2.3. Rationale for government intervention

The rationale for government intervention was to 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.

The proposed Order provides further detail of the precise pre-action requirements, which were recommended by Repossessions Group, in paragraphs 6.26 to 6.30 of the Repossessions Group Final Report, published in June 2009³, and taken forward in through Part 1 of the Home Owner and Debtor Protection (Scotland) Act.

3. Consultation

3.1. Public consultation

In November 2009, during Stage 1 of the Home Owner and Debtor Protection (Scotland) Act's parliamentary scrutiny, Ministers provided the Local Government and Communities Committee initial drafts of what the secondary legislation in relation to pre-action requirements might look like. This was to allow the lead Committee to consider whether the balance between what would be on the face of the Act and what is likely to be in the SSIs was appropriate. At this time, these working drafts were also circulated to all Stakeholders to review and comment, which included these organisations:

Aberdein Considine & Company Solicitors
Anderson Fyfe Solicitors
Building Societies Association

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

³ <http://www.scotland.gov.uk/Publications/2009/06/08164837/0>

Castlemilk Law Centre
Citizens Advice Scotland
Consumer Focus
COSLA
Council of Mortgage Lenders
Dunfermline Building Society
Finance and Leasing Association
Homeloan Management Limited
Irwin Mitchell Solicitors
Law Society for Scotland
Lloyds Banking Group
McClure Naismith Solicitors
Money Advice Scotland
Nationwide Building Society
RBS
Scottish Court Service
Scottish Legal Aid Board
Shelter

3.2. Further consultation

Following meetings in December 2009 and March 2010 and further consultation on revised wording of the SSI by email with mortgage lenders and their representatives, a revised draft was later circulated for consultation with all stakeholders including the advice agencies, the Scottish Court Service and many others in May 2010. Comments on the proposed secondary legislation and its regulatory impact were sought and taken on board at all stages during this extensive consultation period

In particular during this time a working group of mortgage lenders and their representatives was established to discuss the drafting of the proposed Applications by Creditors (Pre-Action Requirements) (Scotland) Order in detail. The Group met on two occasions, on 18 December 2009, and March 2010. Numerous drafts of the instrument were also circulated among the group for comment, to ensure that it would operate in practice. The Group also discussed the regulatory impact of the Order. It was a key objective to ensure synergy with the requirements on lenders already under Financial Services authority regulations including Chapter 13: Arrears and Repossessions of the Mortgages Conduct of Business Rules (MCOB 13).

Membership of the working group included:

Aberdein Considine & Company Solicitors
Anderson Fyfe Solicitors
Council of Mortgage Lenders
Finance and Leasing Association
Homeloan Management Limited

Irwin Mitchell Solicitors
Law Society of Scotland
Lloyds Banking Group
Nationwide Building Society
The Royal Bank of Scotland

4. Costs and benefits

4.1. Benefits

Introduction of the pre-action requirements through the Home Owner and Debtor Protection (Scotland) Act 2010 significantly strengthened home owner protection to ensure that Scottish home owners are well protected in the current economic climate, and years ahead. These new pre-action requirements will ensure proper court scrutiny to check every alternative to repossession has been considered. In giving legislative force to that scrutiny, it offers greater protection for borrowers in Scotland than they currently get, and goes beyond the pre-action protocol in England, which has no substantive legal effect. If we are to meet the national 2012 Homelessness target we must take every action possible to reduce avoidable homelessness applications and the new legislative requirements introduced here will assist that.

Every episode of homelessness prevented also avoids costs falling on local authorities. Research by Heriot Watt university from 2007 indicated that the average cost of sustaining a household made homeless in temporary accommodation was £5,300 per year. It isn't possible to accurately estimate the precise number of episodes of homelessness that will be avoided by the legislation, or their duration, because of the wide range of other factors outwith the control of the Scottish Government (such as whether interest rates continue at their current historically low level) that affect overall numbers at risk of repossession. Moreover neither the CML, FSA or the UK Government have responded positively to requests from the Scottish Government to share data on the actual level of repossessions occurring in Scotland.

The potential saving of £5,300 per household can only therefore be set against data from the Scottish Court Service showing 8,154 applications for repossession being lodged in 2009 and 6,049 decrees for repossession granted that year. The corresponding figures for the first quarter of 2010 are 2,098 applications for repossession lodged and 1,464 decrees granted. However it is important to note that more than one application for repossession may be lodged against the same household, not every decree granted results in actual repossession, and as indicated above the precise extent of any reduction in repossession actions by lenders due to the new legislation is not quantifiable. However the introduction of the Pre-action Protocol in England was thought by the UK Government at the time to have helped reduce the rate of increase in repossession action. As the pre-action requirements introduced by the Home Owner and Debtor Protection Act and these regulations go beyond the corresponding Pre-action protocol in England

in having legislative force behind them, the scale of any reduction in repossessions may be greater here.

4.2. Costs

The proposed pre-action requirements in the SSI take full account of the pre-action requirements already on lenders under UK financial services regulations and the Pre-Action Protocol operating in England, which CML indicate is in practice often applied by lenders across the UK. This should significantly reduce any additional regulatory impact, although there are inevitable differences in language as the Pre-Action Protocol in England is not drafted as legislation, sets out obligations on borrowers as well as lenders, and reflects a different legal system.

Very extensive efforts have been made during the consultation period to take on board comments from creditors and ensure no unnecessary additional burdens are imposed. The Council of Mortgage Lenders has indicated that it is very difficult at this stage to fully assess the impact on lenders, particularly until the consequential revisions to the Scottish Court rules are known. CML believe that some system development costs will be incurred, and that the process may be more costly, take longer and potentially lead to increased levels of losses for lenders.

Some of the additional costs for lenders that do arise, however, will be passed on to borrowers in the form of additional charges while increased levels of losses may find their way into product pricing.. However, as indicated above, such risks have been borne in mind throughout the development of the SSI, and minimised through extensive dialogue with a wide range of organisations representing the interests of both creditors and advice organisations.

Indeed as a consequence of the desire to minimise unnecessary burdens the SSI has the effect of removing the requirement under the Home Owner and Debtor Protection (Scotland) Act for creditors to have to provide information about redemption charges.

Some additional costs will fall on the courts as a result of the additional court scrutiny of these pre-actions by creditors to avoid action for repossession needing to be taken. However these costs on the courts were fully set out in the Financial Memorandum when the Home Owner and Debtor Protection Bill was introduced into Parliament and in the Supplementary Financial Memorandum that set out the implications after Stage 2. Funding has been identified from savings arising in relation to part two of the Home Owner and Debtor Protection Act to cover these costs. This SSI will not impose any new costs that were not previously envisaged, and the latest court data continues to indicate that costs will not exceed those previously estimated.

Similarly local authorities and the advice sector will need to be aware of the new legislation and this Pre-Action Requirements SSI when offering advice to

clients at risk of repossession. However training events to raise awareness of the legislation and all the SSIs are being arranged for local authorities and the advice sector funded by the Scottish Legal Aid Board, with the support of the Scottish Government. Representatives of local authorities and the advice sector were consulted about this SSI, which will not impose any new costs on them not previously envisaged.

5. Competition assessment

There should be no competitive advantage to any particular individual or group, as a result of the Order. It will apply equally to all creditors which hold securities over residential property,

6. Enforcement, sanctions and monitoring

If the creditor makes an application to the court for possession of a residential property either under section 24(1B) of 1970 Act to exercise their remedies on default, or section 5 of the 1894 Act, they will be required complete form 11C, to certify completion of the pre-action requirements. Creditors must demonstrate that they have complied with the pre-action requirements and that all other reasonable attempts to resolve the position have failed, before the Sheriff will grant an application for possession.

If creditors do not comply with the requirements a decree will not be granted, and the courts will have the power to award legal costs against the creditor or make any other order that they judge appropriate.

The Scottish Government will carefully monitor how the new legislation and regulations are working through regular dialogue with the Scottish Court Service, the Council of Mortgage Lenders, Finance and Leasing Association, advice agencies and others.

7. Implementation and delivery plan.

We will prepare and publish Guidance to aid creditors in meeting the pre-action requirements. Creditors will have a statutory requirement to consider this guidance in section 24A(7) of 1970 Act and section 5B(7) of the 1984 Act.

The Sheriff Court Rules Council are revising the court rules to implement the requirements of the legislation, to coincide with commencement. This will include a pre-action requirements checklist (Form 11C), which creditors will have to complete on application to the court for possession.

8. Post-implementation review

Independent research will be commissioned to evaluate how the Home Owner and Debtor Protection Act and all the accompanying regulations, including this one on pre-action requirements, are working in practice. This will involve a mixture of quantitative research, such as analysing court data on trends in the number of applications for repossession sought and the number of decrees

granted, and qualitative research involving interviews and dialogue with creditors, the Scottish Court Service and advice agencies to evaluate the impact on creditors, borrowers, advice agencies and the impact on courts including the smooth running of other court business.

This independent research will be published and the Scottish Government will consider whether any changes are necessary to the legislation or associated guidance in the light of its findings, drawing any such changes to the attention of the Scottish Parliament and liaising with Parliamentary committees as necessary.

9. Summary costs and benefits

The Scottish Government considers that the introduction of the Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010 commands support amongst key stakeholders, and will significantly enhance protection for individuals faced with repossession. There may be some additional costs for businesses in Scotland in meeting the requirements within the Order, and a risk therefore that additional costs may be passed onto borrowers.

However advice organisations such as Shelter, representing the interests of those facing repossession, have recognised that risk, but still believe that the additional protection provided through the Home Owner and Debtor Protection Act and this SSI outweigh such risks. The Scottish Government concurs with that assessment.

I have read the Business Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed.....

Date.....

ALEX NEIL
Minister for Housing and Communities