

Draft Order laid before the Scottish Parliament under section 5B(9) of the Heritable Securities (Scotland) Act 1894 and section 24A(9) of the Conveyancing and Feudal Reform (Scotland) Act 1970, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2010 No.

HOUSING

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

Made - - - - 2010
Coming into force - - 2010

The Scottish Ministers make the following Order in exercise of the powers conferred by section 5B(8) of the Heritable Securities (Scotland) Act 1894(a), section 24A(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970(b) and all other powers enabling them to do so.

In accordance with section 5B(9) of the Heritable Securities (Scotland) Act 1894 and section 24A(9) of the Conveyancing and Feudal Reform (Scotland) Act 1970, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010 and comes into force on the day after the day on which it is made.

(2) In this Order—

“the 1894 Act” means the Heritable Securities (Scotland) Act 1894; and

“the 1970 Act” means the Conveyancing and Feudal Reform (Scotland) Act 1970.

Requirement to provide information about the default

2.—(1) In section 5B(2)(b) of the 1894 Act and section 24A(2)(b) of the 1970 Act the requirement that information about the amount due include information about charges in respect of redemption is removed.

(2) In providing the debtor with clear information for the purposes of section 5B(2) of the 1894 Act and section 24A(2) of the 1970 Act—

(a) information about the terms of the security must include a description of the nature and level of any charges that may be incurred by virtue of the contract to which the security relates if the default is not remedied; and

(a) 1894 c.44. Section 5B was inserted by section 4(2) of the Home Owner and Debtor Protection (Scotland) Act 2010 (asp 6) (“the Act”).

(b) 1970 c.35. Section 24A was inserted by section 4(1) of the Act.

- (b) information about the amount due to the creditor under the security, including any arrears and any charges in respect of late payment must be broken down so as to show—
 - (i) the total amount of the arrears; and
 - (ii) the total outstanding amount due including any charges already incurred.

(3) For the purposes of those sections “charges” do not include any expenses for which the debtor is personally liable to the creditor by virtue of paragraph 12 of Schedule 3 to the 1970 Act, as read with section 11 of that Act(a).

(4) The information required to be provided to the debtor by virtue of those sections must be provided as soon as is reasonably practicable upon the debtor entering into default.

Requirement to make reasonable efforts to agree proposals

3.—(1) In complying with the pre-action requirement contained in section 5B(3) of the 1894 Act and section 24A(3) of the 1970 Act the creditor must—

- (a) make reasonable attempts to contact the debtor to discuss the default;
- (b) provide the debtor with details of any proposal made by the creditor, set out in such a way as to allow the debtor to consider the proposal;
- (c) allow the debtor reasonable time to consider any proposal made by the creditor;
- (d) notify the debtor within a reasonable time of any decision taken by the creditor to accept or reject a proposal made by the debtor; and
- (e) consider the affordability of any proposal for the debtor taking into account, where known to the creditor, the debtor’s personal and financial circumstances.

(2) Where a proposal is made by the debtor which the creditor rejects the creditor must provide reasons for rejecting the proposal in writing within 10 working days of the notification referred to in paragraph (1)(d).

(3) Where the debtor fails to comply with any condition of an agreement reached with the creditor in respect of any proposal and the creditor decides to make an application under section 5(1) of the 1894 Act(b) or section 24(1B) of the 1970 Act(c), and the debtor has not previously failed to comply with any condition of the agreement, the following provisions of this paragraph apply—

- (a) the creditor must give the debtor notice in writing of the decision to make an application and the ground of the proposed application;
- (b) 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 receive the notice; and
- (c) the creditor must not make an application if the failure by the debtor to comply with a condition of the agreement, constituting the ground of the proposed application, is remedied during that period.

(4) For the purposes of this article, the debtor is deemed to receive the notice given under paragraph (3)(a)—

- (a) if sent by post, at the time at which the letter would be delivered in the ordinary course of post;
- (b) if sent by electronic communication, on the day after the day on which the electronic communication containing it was sent; and
- (c) if otherwise given to the debtor, at the time of delivery.

(a) Section 11 was amended by the Redemption of Standard Securities (Scotland) Act 1971 (c.45), section 1(a); and by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5), schedule 12, paragraph 30(8).
 (b) Section 5 was renumbered section 5(1) by the Act, section 3(1)(a).
 (c) Section 24(1B) was inserted by the Act, section 2(2).

(5) In this article—

- (a) “working day” means a day that is not a Saturday or Sunday, nor any day that is a bank holiday under the Banking and Financial Dealings Act 1971^(a) in any part of the United Kingdom; and
- (b) “electronic communication” has the meaning given by section 15(1) of the Electronic Communications Act 2000^(b); such communications referred to in paragraph (4) must be sent to an address notified to the creditor by the debtor for the purpose of receiving communications relating to the security, and must be—
 - (i) capable of being accessed by the recipient;
 - (ii) legible in all other material respects; and
 - (iii) sufficiently permanent to be used for subsequent reference.

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

4.—(1) Steps taken by the debtor which are steps within the meaning of section 5B(4)(a) of the 1894 Act and section 24A(4)(a) of the 1970 Act include providing documentary evidence to the creditor—

- (a) of submission of a claim to an insurer under a payment protection policy currently held by the debtor in respect of the security or the contract to which the security relates, where the evidence demonstrates a reasonable expectation of eligibility for payment from the insurer, unless paragraph (3) applies;
- (b) of submission of an application by the debtor to a support scheme run by Scottish Ministers or the United Kingdom Government, where the evidence demonstrates a reasonable expectation of being eligible for support in respect of the security or the contract to which the security relates, unless the creditor does not participate in, does not agree with any term of, or does not agree to the sale of the property in accordance with such a scheme or unless paragraph (3) applies; and
- (c) demonstrating that the debtor or a person acting as agent for the debtor is actively marketing the property for sale at an appropriate price in accordance with professional advice, unless paragraph (4) applies.

(2) Documentary evidence for the purposes of paragraph (1)(c) must include the documents prescribed for the purposes of sections 98, 99(1) and 101(2) of the Housing (Scotland) Act 2006^(c), where section 98 requires the person responsible for marketing the property to possess those documents.

(3) This paragraph applies where either the step in paragraph (1)(a) or (1)(b) is taken and—

- (a) the debtor’s claim or application has not been determined within a reasonable time or is refused; or
- (b) the debtor is unable to pay any amount due under the security which is not covered by the insurance policy or support scheme.

(4) This paragraph applies where the step in paragraph (1)(c) is taken and—

- (a) the debtor rejects a reasonable offer to purchase the property;
- (b) the property has not sold within a reasonable time of that step being taken; or
- (c) the debtor refuses to provide the creditor with details of any agent acting for him in relation to the marketing or sale of the property or to authorise any such agent to communicate with the creditor, resulting in the creditor being unable to readily ascertain if the circumstances in sub-paragraphs (a) or (b) have occurred.

(a) 1971 c.80.

(b) 2000 c.7. Section 15(1) was relevantly amended by the Communications Act 2003 (c.21.), Schedule 17, paragraph 158.

(c) 2006 asp 1.

Requirement to provide information about sources of advice and assistance

5. For the purposes of the pre-action requirement contained in section 5B(5) of the 1894 Act and section 24A(5) of the 1970 Act, sources of advice and assistance include—

- (a) where the security is regulated, any relevant information sheet published by the appropriate regulatory body;
- (b) a citizens advice bureau or other advice organisation; and
- (c) the housing department of the local authority in whose area the property which is subject to the security is situated.

St Andrew's House,
Edinburgh
Date

Signature
Authorised to sign by the Scottish Ministers

EXPLANATORY NOTE

(This Note does not form part of the Order)

This Order makes provision in relation to the pre-action requirements set out in section 5B of the Heritable Securities (Scotland) Act 1894 (“the 1894 Act”) and section 24A of the Conveyancing and Feudal Reform (Scotland) Act 1970 (“the 1970 Act”), both Acts as amended by the Home Owner and Debtor Protection (Scotland) Act 2010.

Creditors in securities over residential property are required, by virtue of section 5(3) of the 1894 Act and section 24(1C) of the 1970 Act, to comply with these pre-action requirements before making an application to the court to eject the proprietor from the property (under section 5(1) of the 1894 Act) or to exercise their remedies on default of the debtor (under section 24(1B) of the 1970 Act).

Article 2 makes further provision about the requirement to provide the debtor with certain information about the default. Article 2(1) removes the requirement to provide information about charges in respect of redemption.

Article 3, paragraphs (1) and (2), specifies steps which must be taken by the creditor in complying with the requirement to make efforts to agree proposals as alternatives to a court application. Paragraph (3) makes provision as to steps to be taken by the creditor in dealing with any failure by the debtor to comply with a condition of an agreement made in compliance with that requirement.

Article 4, paragraphs (1) and (2), makes further provision about steps taken by the debtor which are likely to result in payment or fulfilment of other obligations within a reasonable time, thereby requiring the creditor not to make an application to court for as long as those steps are being taken. Paragraphs (3) and (4) set out exceptions which would allow the creditor to make an application despite such steps being taken.

Article 5 makes further provision as to the information which must be provided by the creditor in compliance with the duty to provide the debtor with information about sources of advice and assistance in relation to management of debt.

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