



Home Owner and Debtor Protection (Scotland) Act 2010

2010 asp 6

The Bill for this Act of the Scottish Parliament was passed by the Parliament on 11th February 2010 and received Royal Assent on 18th March 2010

An Act of the Scottish Parliament to amend the law regarding the enforcement of standard securities over residential property; to amend the Bankruptcy (Scotland) Act 1985 as regards the grounds on which a debtor may apply for sequestration, the types of voluntary trust deed to which the Act applies, the sale or disposal of a debtor's family home and requirements to publish notices about sequestration in the Edinburgh Gazette; and for connected purposes.

PART 1

RESIDENTIAL STANDARD SECURITIES ETC.: CREDITOR'S RIGHTS ON DEFAULT

1 Residential standard securities: restriction of creditor's remedies

- (1) In section 20 (creditor's rights on default of debtor on calling-up notice) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (c. 35) (“the 1970 Act”), after subsection (2) insert—

“(2A) Where the standard security is over land or a real right in land used to any extent for residential purposes, the creditor is entitled to exercise the rights specified in standard condition 10(2) and (3) (and mentioned in subsections (1) and (2) above) only—

- (a) where the conditions in section 23A of this Act are satisfied, or
- (b) with the warrant of the court, granted on an application under section 24 of this Act.”.

- (2) In section 23 (rights and duties of parties after service of notice of default) of the 1970 Act, after subsection (3) insert—

“(4) Where the standard security is over land or a real right in land used to any extent for residential purposes—

- (a) the creditor is entitled to exercise the right specified in standard condition 10(2) only—

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- (i) where the conditions in section 23A of this Act are satisfied, or
- (ii) with the warrant of the court, granted on an application under section 24 of this Act, and
- (b) subsection (3) above has effect as if the reference to the last foregoing subsection were a reference to section 24 of this Act.”.

(3) After section 23 of the 1970 Act insert—

“23A Voluntary surrender of residential property following calling-up notice or notice of default

- (1) The conditions referred to in sections 20(2A)(a) and 23(4)(a)(i) are that—
 - (a) the security subjects are unoccupied; and
 - (b) each of the persons specified in subsection (2) below has, in writing—
 - (i) certified that that person does not occupy the security subjects and is not aware of the security subjects being occupied by any other person;
 - (ii) consented to the exercise by the creditor of the creditor's rights on default; and
 - (iii) certified that the consent is given freely and without coercion of any kind.
- (2) Those persons are—
 - (a) the debtor;
 - (b) the proprietor of the security subjects (where the proprietor is not the debtor);
 - (c) the non-entitled spouse of the debtor or the proprietor of security subjects which are (in whole or in part) a matrimonial home;
 - (d) the non-entitled civil partner of the debtor or the proprietor of security subjects which are (in whole or in part) a family home; and
 - (e) a person who has occupancy rights in the security subjects by virtue of an order under section 18(1) (occupancy rights of cohabiting couples) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981.
- (3) In this section—
 - “family home” has the meaning given by section 135(1) of the Civil Partnership Act 2004;
 - “matrimonial home” has the meaning given by section 22 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981;
 - “non-entitled civil partner” has the same meaning as “non-entitled partner” in section 101(1) of the Civil Partnership Act 2004;
 - “non-entitled spouse” has the meaning given by section 1 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981.”.

Commencement Information

- II** [S. 1](#) in force at 30.9.2010 by [S.S.I. 2010/314](#), [art. 3](#) (with transitional provisions and savings in S.S.I. 2010/316, arts. 4, 5)

2 Court applications by creditor for remedies on default

- (1) Section 24 (application by creditor to court for remedies on default) of the 1970 Act is amended as follows.
- (2) After subsection (1) insert—
 - “(1A) Subsection (1) above does not apply in relation to a creditor in a standard security over land or a real right in land used to any extent for residential purposes.
 - (1B) A creditor in a standard security of that kind may, where the debtor is in default within the meaning of paragraph (a), (b) or (c) of standard condition 9(1), apply to the court for warrant to exercise any of the remedies which the creditor is entitled to exercise on a default within the meaning of standard condition 9(1)(a).
 - (1C) Before making an application under subsection (1B) above the creditor must comply with the pre-action requirements imposed by section 24A of this Act.
 - (1D) An application under subsection (1B) above is to be made by summary application (regardless of whether it includes a crave for any other remedy).”.
- (3) In subsection (2), for “such an application as aforesaid” substitute “ an application under subsection (1) or (1B) ”.
- (4) In subsection (3)—
 - (a) for “subsection (1)” substitute “ subsection (1B) ”, and
 - (b) the words from “if” to “purposes” are repealed.
- (5) After subsection (4A) insert—
 - “(5) The court may, on an application under subsection (1B) above, continue the proceedings or make any other order that it thinks fit; but it may not grant the application unless it is satisfied that—
 - (a) the creditor has complied with subsection (1C) above; and
 - (b) it is reasonable in the circumstances of the case to do so.
 - (6) In considering an application under subsection (1B) above where the debtor appears or is represented, the court is to have regard in particular to the matters set out in subsection (7) below.
 - (7) Those matters are—
 - (a) the nature of and reasons for the default;
 - (b) the ability of the debtor to fulfil within a reasonable time the obligations under the standard security in respect of which the debtor is in default;
 - (c) any action taken by the creditor to assist the debtor to fulfil those obligations;
 - (d) 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
 - (e) the ability of the debtor and any other person residing at the security subjects to secure reasonable alternative accommodation.
 - (8) Subsections (5) and (6) above do not affect—

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- (a) any power that the court may have; or
 - (b) any rights that the debtor may have,
- by virtue of any other enactment or rule of law.

(9) Where—

- (a) the default in respect of which an application is made under subsection (1B) above is a default within the meaning of paragraph (a) or (b) of standard condition 9(1); and
- (b) before a decree is granted on the application, the obligations under the standard security in respect of which the debtor is in default are fulfilled,

the standard security has effect as if the default had not occurred.”.

Commencement Information

I2 [S. 2](#) in force at 30.9.2010 by [S.S.I. 2010/314](#), [art. 3](#) (with transitional provisions and savings in S.S.I. 2010/316, arts. 4, 6)

3 Court powers in action for possession of residential property

(1) In section 5 (power to eject proprietor in personal occupation) of the Heritable Securities (Scotland) Act 1894 (c. 44) (“the 1894 Act”)—

- (a) the existing provision becomes subsection (1),
- (b) after that subsection insert—

“(2) Proceedings under subsection (1) by a creditor in a security over land or a real right in land used to any extent for residential purposes are to be brought by summary application (regardless of whether they include a crave for any other remedy).

(3) Before making an application under subsection (1) in a case referred to in subsection (2), the creditor must comply with the pre-action requirements imposed by section 5B.”.

(2) After section 5 of the 1894 Act insert—

“5A Court powers on section 5 proceedings relating to residential property

(1) This section applies to an application under section 5(1) by a creditor in a security over land or a real right in land used to any extent for residential purposes.

(2) The creditor must—

- (a) serve on the proprietor a notice in conformity with Form 1 in Part 2 of the schedule to the Mortgage Rights (Scotland) Act 2001,
- (b) serve on the occupier of the security subjects a notice in conformity with Form 2 in that Part of that schedule, and
- (c) give notice of the application to the local authority in whose area the security subjects are situated, unless the creditor is that local authority.

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- (3) A notice under subsection (2)(a) or (b) must be sent by recorded delivery letter addressed—
 - (a) in the case of a notice under subsection (2)(a), to the proprietor at the proprietor's last known address,
 - (b) in the case of a notice under subsection (2)(b), to “The Occupier” at the security subjects.
- (4) Notice under subsection (2)(c) is to be given in the form and manner prescribed under section 11(3) of the Homelessness etc. (Scotland) Act 2003.
- (5) The court may continue the proceedings or make any other order that it thinks fit on the application; but it may not grant the application unless it is satisfied that—
 - (a) the creditor has complied with section 5(3); and
 - (b) it is reasonable in the circumstances of the case to do so.
- (6) In considering the application in a case where the debtor appears or is represented, the court is to have regard in particular to the matters set out in subsection (7).
- (7) Those matters are—
 - (a) the nature of and reasons for the default,
 - (b) the ability of the debtor to fulfil within a reasonable time the obligations under the security in respect of which the debtor is in default,
 - (c) any action taken by the creditor to assist the debtor to fulfil those obligations,
 - (d) 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
 - (e) the ability of the debtor and any other person residing at the security subjects to secure reasonable alternative accommodation.
- (8) Subsections (5) and (6) do not affect—
 - (a) any power that the court may have, or
 - (b) any rights that the debtor may have,by virtue of any other enactment or rule of law.”.

Commencement Information

I3 [S. 3](#) in force at 30.9.2010 by [S.S.I. 2010/314](#), [art. 3](#) (with transitional provisions and savings in [S.S.I. 2010/316](#), arts. 4, 6)

4 Pre-action requirements

- (1) After section 24 of the 1970 Act insert—

“24A Section 24(1B) proceedings: pre-action requirements

- (1) The pre-action requirements referred to in section 24(1C) of this Act are set out in subsections (2) to (6) below.