

Legislation update

Home Owner and Debtor Protection (Scotland) Bill

This Bill which was introduced on 1 October 2009 is now undergoing scrutiny at its first stage in committee. The legislation is of great importance to mortgage lenders who hold a standard security over private residential property. Put briefly, it aims to restrict the remedies available to lenders where they seek to enforce a standard security in cases of default in payments by home owners. It also provides safeguards to people other than the borrower, such as spouses, civil partners or people living together in a like relationship and introduces a number of new procedural steps which a mortgage lender must satisfy before they are entitled to enter into possession or sell and enforce a standard security over residential property. The policy aim of the proposed legislation is to protect home owners and debtors during the present period of recession and to prevent homelessness occurring through insolvency. To achieve this, it will now be necessary for all repossession cases to call in court, except in cases where there is a voluntary surrender by the homeowner. This will ensure scrutiny from a sheriff who will require to be satisfied that statutory pre-action requirements have been met. The pre-action requirements are not only that clear information is given to the debtor about the terms of the standard security, the nature of the default and the amount due to the creditor under the security as one would expect, but includes a range of other requirements aimed at heading off repossession. Now the creditor must make “reasonable efforts” to agree with the debtor proposals in respect of future payments under the terms of the standard security. The creditor cannot enforce if the debtor is taking steps which are likely to result in payment of arrears or payment of the whole amount due under the security within a “reasonable time”. Further, the bill if it becomes law, requires the creditor to provide the debtor with information about sources of advice and assistance in relation to management of debt. The creditor must also “encourage” the debtor to contact the local authority where the property is situated and to have regard to any guidance issued by the Government. Even in cases where a decree allowing repossession has been pronounced by the court, there will be a right to seek to recall that decree on the application of the debtor or other protected resident (such as a spouse or partner) within fourteen days provided they have not previously entered appearance in court. It is early days yet, but if the bill becomes law in its present terms, it will present significant obstacles to

enforcement for mortgage lenders and potentially result in increased legal expense and delay for them. At this stage also, it is not clear as to how, or for what purpose a lender requires to encourage the debtor to contact his or her local authority, or what “reasonable efforts” are, or what a “reasonable time” is. No doubt this will all be clarified in due course by Government guidance, but it all nonetheless represents a legal minefield in the path of standard security holders who wish to enforce against a party defaulting on their mortgage payments.

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