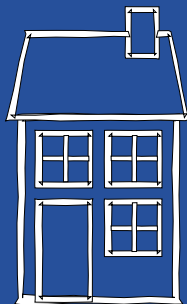


**Problems with your
Mortgage?**

Worried about Court Action?

The Mortgage Rights (Scotland) Act 2001

May help you



**A summary of your rights if you are
facing mortgage repossession**



SCOTTISH EXECUTIVE

Making it work together

GENERAL ADVICE

on how the Mortgage Rights Act might help you

This leaflet explains the Mortgage Rights (Scotland) Act 2001.¹ If after reading it you are not sure about your position or about what to do next, you should get advice from one of the sources given at the back of the leaflet. Don't delay.

The Act gives extra protection if you are being taken to court by your mortgage lender (building society, bank, etc.).

When you take on a mortgage you agree to make the payments required. You also agree to other conditions like insuring your house and keeping it in good repair.

If you are having problems keeping up with your payments or meeting other conditions of your mortgage the first thing you should do is discuss it with your lender. Most lenders are sympathetic and will try to help. You may also need to get legal and debt advice – see the contacts at the back of the leaflet.

If you do not keep to your agreement your lender can take you to court and ask to take over your house and sell it.

If your mortgage lender goes ahead with court action you now have the right to ask the Sheriff to:

- give you time to pay off arrears; or
- give you time to find somewhere else to stay.

You do this by applying to the court. You should make your application through a solicitor. You may get legal aid to help you with the cost of legal advice.

If someone else has the mortgage but you might lose your home because they are having problems with the lender, the Act may help you.

The rest of this leaflet gives more detailed information in question and answer form. It is designed to help you understand your position. It is not a substitute for proper advice from your lender, your solicitor, your financial adviser or the sources at the back of this leaflet. It is not a definitive statement of the law. Only the courts can say exactly how the Act should be interpreted.

¹The Mortgage Rights (Scotland) Act 2001 came into force on 3 December 2001. A copy of the Act and its explanatory notes can be found on the internet at http://www.scottish.parliament.uk/parl_bus/bill-final.htm#19

QUESTIONS AND ANSWERS

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PART 1: ACTION BY A LENDER – THE PROCESS

1. When can the lender take action?

If you borrowed money to buy your home, you will have entered into a legally binding arrangement normally called a “standard security” – more commonly known as a mortgage.

The format for all standard securities was set in law in Part II of the Conveyancing and Feudal Reform (Scotland) Act 1970. The 1970 Act also sets out 12 standard conditions that the lender and borrower are required to keep. These conditions are set out in the Act but can be varied by agreement between the lender and borrower.

The first seven of these conditions concern the maintenance of the value of the secured property and place certain obligations upon the borrower which the lender can carry out if the borrower fails to do so. The remaining conditions deal with the lender’s rights to enforce the mortgage, including their right to pursue the borrower for payment of any mortgage arrears and allow the lender to recover from the borrower any expenses incurred in exercising those rights.

Where you fail to keep up with your mortgage repayments or to carry out other obligations under your mortgage agreement, your bank or building society or other lender can take action to (among other things) sell or enter into possession of the property.

2. How does the lender take action?

There are four different processes which your lender might use to enforce their rights.

- a. *a calling-up notice*: is issued by your lender and would require you to repay the whole sum borrowed and any interest and expenses within two months.
- b. *a notice of default*: is issued by the lender and would require you to remedy the default specified within one month (for example, repay the arrears); and

- c. *a warrant under section 24 of the 1970 Act*: your lender can apply to the court for a warrant to obtain the right to exercise any of the remedies available to them if you are in default. Remedies include undertaking necessary maintenance to the property and selling the property to pay off the outstanding debt.
- d. *section 5 of the Heritable Securities (Scotland) Act 1894*: For all mortgages, including those entered into before 1970, the lender can apply to the court under section 5 to eject the borrower where the borrower is in arrears and still occupies the property.

3. Does the lender have to go to court?

A lender cannot simply put you out of your property against your will. If you do not leave of your own accord, a court procedure is required.

4. Can the lender charge me for its legal costs in taking action against me?

The Conveyancing and Feudal Reform (Scotland) Act 1970 allows the lender to recover from the borrower certain expenses incurred in exercising its rights. If you are disputing the amount of costs being asked for by your lender you should consult your solicitor.

5. What if I think my lender has no grounds for raising an action against me?

You should contact your lender in the first instance to clarify why it is taking action. In some circumstances you may be able to change your mortgage lender with relative ease (but not if you are in arrears). However, you should contact your solicitor on the specific action taken by your lender for advice on your circumstances.

6. What if I think my lender is not treating me fairly?

Most lenders follow the Mortgage Code which sets out the standards of good practice as to how mortgage lenders and brokers should deal with their customers. To find out whether your lender has agreed to comply with the Code, you can contact the Mortgage Code Compliance Board Helpline on **01785 218200**.

If your lender follows the Code, you can get a copy from your local branch. You can also get a copy of the Code on the Mortgage Code Compliance Board website at: <http://www.mortgagecode.org.uk/mortgagecode.html>

Where your lender subscribes to the Code but you believe it is not following the Code properly, you should first raise this point with your lender. The Mortgage Code requires that all subscribers to the Code have their own internal procedures for resolving problems fairly and speedily. Normally a complaint will be reviewed by a suitably trained member of staff whose job it is to help borrowers in these circumstances. If that does not resolve the matter to your satisfaction, you are entitled to require the lender or broker to refer your query to an Ombudsman or the Mortgage Code Arbitration Scheme.

Where your lender does not subscribe to the Code, you should contact a solicitor immediately for further advice on your specific circumstances.

Do not delay whatever you choose to do – as that may make your situation worse.

7. Can I repay my arrears and stay in my home?

Where you are experiencing mortgage difficulties, you should contact your lender right away to explore what can be done. Most lenders will make significant efforts to resolve the situation with you. They are likely to be more sympathetic if you have a good past history, or if your circumstances are now changing for the better.

You should remain in close contact with your lender so that if circumstances change and you can repay your arrears they can help you get your mortgage back on track.

8. What options do I have if I cannot repay my arrears?

You should contact your lender to discuss what options you have available. You may be able to claim Mortgage Payment Protection Insurance where you have taken out such a policy to cover your repayments in certain circumstances (e.g. unemployment).

Alternatively, you may be able to claim Income Support for Mortgage Interest (ISMI) and should contact your local social security office for further information.

You should also consider whether you are able to sell your home with your lenders consent and “trade down” to a less expensive house. These are options your solicitor and your lender can advise further on.

9. What benefit will I receive through ISMI?

If your *mortgage began before 2 October 1995* you will get no help with mortgage interest for the first 8 weeks of your claim; half your allowable mortgage interest for the next 18 weeks of your claim; all your allowable mortgage interest after 26 weeks of your claim.

If your *mortgage began on or after 2 October 1995* you will normally get no help with mortgage interest for the first 39 weeks of your claim; all your allowable mortgage interest from the 40th week of your claim.

10. How will the Mortgage Rights Act help me?

The Mortgage Rights (Scotland) Act 2001 gives you the right to go to the court and defend your position, where a lender takes action under the processes mentioned in question 2.

11. What could this mean for me?

Where you make an application to the court and challenge the lender's action, the court will consider the facts of the case and your specific circumstances. The court will also consider any action taken by the lender to assist you in meeting your obligations. The Act provides for the court to consider whether:

- you may be able to repay the debt or arrears, or fulfil the obligations under the mortgage, within a reasonable time so as to keep your home; or
- the action by the lender should be delayed for a short time to give you and others staying at your home time to find alternative accommodation.

PART 2: MORTGAGE RIGHTS ACT – MAKING AN APPLICATION

12. Am I eligible to apply to the courts under the Mortgage Rights Act?

You can apply if you are the borrower (or the owner of the house where the owner is not the borrower), the property concerned is your sole or main residence and the lender has started proceedings to enforce its rights under the processes outlined at question 2.

You can also apply if you are the borrower's spouse (see questions 14 & 15) and in certain circumstances where you are the borrower's partner (see questions 16 & 17).

13. How will I know if my lender has started any of the processes in question 2?

Where a lender has issued a calling-up notice or a notice of default you will have had a copy of this notice sent or delivered to your home. (See Part 4 for more detail)

Where your lender has made an application under section 24 of the 1970 Act or commenced proceedings under section 5 of the 1894 Act you should have been sent notice of this action to your home.

14. As the borrower's spouse, can I apply?

If you have a joint mortgage, and the house is your sole or main residence, as a co-borrower you can apply to the court.

Where you are married to the borrower or owner, but do not have any legal obligation in respect of the mortgage over the house, you are known as a non-entitled spouse. As the non-entitled spouse you can also apply to the court if the house is your sole or main residence.

15. Can I apply if my spouse is no longer living at the house?

Where the house is no longer the sole or main residence of your spouse, who is the sole borrower or owner, but it remains your sole or main residence, as a non-entitled spouse, you can apply under the provisions of the Act.

16. As the borrower's partner, can I apply?

If your partner is the borrower or owner, you can apply if the house is the sole or main residence of both yourself and your partner. This includes same sex partners.

17. Can I apply if I have split up with my partner but I still live at their house?

If you have split up with your partner and they no longer live in the house, you can only make an application if:

- a. the house is still your sole or main residence; and
- b. you lived with your ex-partner (the borrower or owner) for at least a six-month period up to the date when they moved out and the house ceased to be their sole or main residence; and
- c. the house is the sole or main residence of a child under 16 years of age for whom you and your ex-partner have responsibility.

18. What about step-children?

The definition of a "child" includes a step-child and someone brought up by or treated by you and your former partner (the borrower or owner) as their child.

19. As the tenant, can I apply?

No. But you should seek advice from a solicitor or Citizens Advice Bureau on your rights and try to secure alternative accommodation.

20. Can my landlord apply?

Only if your landlord is resident in the property. For the owner to be able to apply the property must be their sole or main residence.

21. Can I apply at any time?

No. Applications to the court must be made within a certain time period, as follows:

Where the lender has sent a calling-up notice or a notice of default, you have *two months* from when the notice was served in which to make your application (although this period may be shortened with agreement).

If the lender has made an application under section 24 of the 1970 Act or commenced proceedings under section 5 of the 1894 Act, you should apply as soon as possible, as you must make an application *before the conclusion of the proceedings*.

You should check which notice you have received from your lender.

22. What if I do not wish to apply? Am I being forced to run up further arrears when I just want the property repossessed?

If you are not making an application to the court, you can agree with your lender to shorten the period of notice under the calling-up notice and notice of default process to a minimum of one month.

23. How do I make an application?

You should consult a solicitor to act on your behalf in making the application. Help with all or part of the cost of legal advice may be available under legal aid. Your solicitor will be able to advise you on this.

24. What happens after I make an application?

The court will consider whether to suspend the lender's enforcement rights or continue any existing proceedings.

You will be informed by the court of the date your application will be considered.

25. Do I need to prepare any information before the court date?

You should discuss your circumstances and experience with your solicitor who will advise what specific information you should collect to present at the court. You will though wish to consider:

- (i) the history behind your mortgage difficulties and your arrears position and the assistance provided by your lender to come to some arrangement to sort out your difficulties. You should keep copies of all correspondence to and from your lender about your arrears;
- (ii) your ability to repay the arrears (or make good any other default) and get back on track with your mortgage, including the time period required to achieve this; and
- (iii) the ability of you and others residing in your property to obtain alternative accommodation, including the availability of accommodation and when you can move in to it.

PART 3: COURT DECISION

26. What will happen in court?

The Mortgage Rights (Scotland) Act allows the Sheriff Court to consider the circumstances of the case both from the lender's perspective and on the basis of your circumstances.

The court will consider a number of criteria and where the Sheriff believes it is reasonable in all the circumstances can either:

- a. grant the lender an order for possession; or
- b. provide, through a Section 2 Order under the Mortgage Rights Act, time for you to pay off the outstanding arrears (or remedy the default) if, in the Sheriff's view, you are likely to be able to do this; or
- c. provide, through a Section 2 Order under the Mortgage Rights Act, sufficient time for you and others staying in the house to arrange alternative accommodation and avoid risking homelessness.

27. What can the court include in the Section 2 Order?

The court has a great deal of scope in making the Section 2 Order and can use the order to require certain actions to be undertaken by both you and the lender. This action can be required for any period and be subject to any conditions as the court thinks fit.

For example the court may require you to repay a certain amount of arrears each month towards getting your mortgage back on track. The court may also impose a condition that you should seek advice on debt management from a qualified adviser.

Where the application is made during proceedings under section 24 of the 1970 Act or section 5 of the 1894 Act, the Sheriff can continue (postpone) the proceedings to such date as he or she thinks fit.

28. What issues will the court consider before coming to a decision?

In reaching a decision, the court will seek to balance your rights with the rights of your lender and will consider the particular factors and overall circumstances of the case.

The specific issues the court may wish to consider are:

- the nature and the reason for your default on the mortgage;
- your (the applicant's) ability to fulfil, within a reasonable period, the obligations under your mortgage;
- any action by your lender to help you fulfil your obligations under your mortgage; and
- your (the applicant's) ability and that of any other person living in the property to arrange alternative accommodation.

29. Will I have to speak in court?

If you are making an application to the court for your lender's rights to be suspended, you may have to explain to the court issues such as:

- why you got into difficulties with your mortgage – such as a loss of income or job, or illness;
- what you have done to come to or try to come to an arrangement with your lender to repay your arrears and get the mortgage back on track;
- if you have failed to keep to previous arrangements with your lender, why that happened;
- how you now hope to pay off your arrears and get back on track with payments;
- efforts you and others living in your house have taken to find alternative accommodation; and
- how long you think it will take you and the other people living in your house to find alternative accommodation.

30. What will the lender say in court?

The lender may also have to explain to the court issues such as:

- how much you are in arrears;
- how long you have been in arrears;
- their view of why you are in arrears;
- what efforts they have made to contact you and come to some arrangement about paying off the arrears; and
- whether you have kept to any previous arrangements to pay off arrears.

31. What if I have received a calling-up notice asking me to repay all my mortgage, which I cannot achieve?

A calling-up notice requires the borrower to repay the whole loan rather than simply pay off any arrears or rectify any other forms of default. In this case the “default” is the failure to comply with the notice.

If this is the case, you can still apply to the courts under the Mortgage Rights (Scotland) Act. After listening to the circumstances of the case, the court can suspend the enforcement of the calling-up notice for such a period as it chooses and indeed until the notice expires. This means that you would not be required to repay all your mortgage, as requested in the calling up notice.

The court can also attach conditions to their decision through the Section 2 Order. For example, the court can make a Section 2 Order to require you to repay the arrears within a certain time period..

32. What sort of conditions can the court attach to the Section 2 Order?

The court can make conditions about the repayment of arrears. For example, the court can specify how much the borrower must pay every month, and for how long, to clear the arrears. The court could also specify that the borrower has a couple of months to find alternative accommodation, before the lender can take possession of the house.

33. What happens if I do not keep to the conditions of the Order or my circumstances change?

After a Section 2 Order has been granted, you or the lender can apply to the court to change the terms of the Order or revoke it (i.e. take away the agreement made by the Order), or to continue proceedings to a future date.

34. Can the lender sell my house while an Order is in force?

No. Once the court has granted an Order, the clerk of the court will send a notice about the Order, with a certified copy of the Order attached, to the Keeper of the Register of Inhibitions and Adjudications for recording.

If the lender tried to sell the house while an Order was in

force, a search of the Register of Inhibitions (which is a routine part of any house purchase) would show that the lender's rights to enforce the standard security have been suspended, and the lender could not give a purchaser a clear title. This would mean that the house could not be sold.

PART 4: SUMMARY OF NOTICES TO BE USED

35. Who will receive the notices of the lender's enforcement action?

The Act provides for the borrower, the owner (if different) and the occupier of the property to receive notice of any enforcement action by the lender.

36. How will the notices be sent?

The notices will be sent by recorded delivery.

37. What is the purpose of the notices?

The notices seek to encourage the recipients to obtain legal advice on their rights and where required, advice on debt management.

38. What should I do if my lender sends me a notice?

You should obtain legal advice on your rights from a solicitor or one of the advice agencies such as a Citizen's Advice Bureau. You will be advised on the correct procedure to make an application, and what information you should provide to the court to support your application. Some contact addresses and phone numbers are given at the end of this leaflet.

39. Can I simply ignore the notice or not accept the recorded delivery to avoid enforcement action?

No. If you ignore the notice, you will lose your opportunity to go the court and avoid enforcement action.

On receipt of the notice, you should contact your lender right away to explore available arrangements to sort out your difficulties. You should also seek legal advice and advice on debt management, if required.

EXPLANATION OF TERMS

A **standard security** is the legal agreement that secures the money borrowed (the debt) from a bank, building society or other creditor over an interest in land (usually a property such as a house). A standard security is the legal term in Scotland for what is commonly called a mortgage.

A debtor under a standard security **defaults** when that person fails to comply with an obligation under the standard security, most commonly by the debtor who owns the property or a guarantor failing to keep up mortgage repayments. Other defaults include failure to maintain the property and renting out the property without obtaining the consent of the creditor.

Where one spouse has the right to occupy the matrimonial home either as owner or as tenant of the property and the other spouse does not have that right, that other spouse is the **non-entitled spouse**.

A **calling-up notice** is issued by the creditor and requires the debtor to repay the whole sum borrowed and any interest within two months. The creditor may be entitled to serve a calling-up notice even where the debtor is not in default, but failure to comply with the notice is itself a default. A calling-up notice expires five years from the date of the notice or from the date of the last offer for sale, if the creditor exercised the right to sell.

A **notice of default** is issued by the creditor and requires the debtor to remedy the default within one month. A notice of default expires five years from the date of the notice.

The creditor can apply to the court for a **warrant under section 24** of the 1970 Act to obtain the right to exercise any of the remedies available to the creditor when the debtor is in default. Remedies include undertaking necessary maintenance to the property and selling the property to pay off the outstanding debt.

The creditor can apply to the court under **section 5** of the 1894 Act to eject the debtor where the debtor is in arrears and still occupies the property.

USEFUL ADDRESSES

Housing advice may be available from:

Your local Council Housing Department.

Your local Citizen's Advice Bureau.

A law centre.

You should be able to find local offices by looking up the telephone directory for your area or checking at your local library. The Internet lists law centres at:

<http://www.scottishlaw.org.uk/lawfirms/index.html>.

If you have difficulty in locating a Citizen's Advice Bureau you should contact the Head office address given below.

The Head Office staff cannot deal with personal enquiries but will be able to refer you to your nearest office which provides independent advice and assistance.

Citizens Advice Scotland

26 George Square

EDINBURGH

EH8 9LD

Telephone: 0131 667 0156

Alternatively, contact details can be obtained on the Internet at: <http://www.cas.org.uk/>

There are also Shelter Housing Aid Centres (SHAC) in Scotland which provide free, independent advice and assistance. They can be found at the following addresses:

Aberdeen SHAC
47 Belmont Street
ABERDEEN AB1 1JS
Telephone: 01224 645586

Edinburgh SHAC
Ground Floor Unit 2
Kittle Yards Causewayside
EDINBURGH EH9 1PJ
Telephone: 0131 466 8031

Glasgow SHAC
53 St Vincent Crescent
GLASGOW G3 8NQ
Telephone: 0141 221 8995

Nithsdale Housing Advice Service
Holywood Trust building
Old Assembly Close
Irish Street
DUMFRIES DG1 2PH
Telephone: 01387 51192

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