

A man with short, dark hair, wearing a light blue button-down shirt, is shown in profile from the chest up. He is looking down at a white document he is holding with both hands. The background features a wall with a floral pattern in yellow and grey.

LSA

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Mortgage Repossessions: The New Law

A guide for homeowners and their advisors on mortgage repossession through the Sheriff Court by Adrian Stalker, Advocate.

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Introduction

Home Ownership - policy in practice – has been characterised as an “obsessive love affair gone very wrong”. The UK is heavily dependent on private home ownership yet there are acute shortages contributing to homelessness. Those lucky enough to buy a house sometimes find it unaffordable whilst, on sale, at the wrong stage of the economic cycle, home owners may be left with a substantial debt. Unemployment, illness or family break-up and, even, having children can easily result in owning a home becoming unaffordable. The sum of these problems worldwide threatened many major banks. Whether homeowners or not, we will all be paying for the fallout for many years.

Aside from keeping the interest rates down, there are few immediate answers to the overall picture. However, a number of welcome policies have been put in place in recent years to provide some degree of assistance. This includes, for instance the Mortgage to Rent Scheme whilst a number of years ago the law was reformed to provide the courts with a degree of scrutiny of repossession actions so as to, for instance, prevent repossession of a home as a result of mortgage arrears that could be repaid by reasonable instalments. This reform came about, in part, as a result of concerns expressed by Legal Services Agency that home owners in Scotland did not have the same protection as those in similar circumstances in England and Wales.

After the most recent economic downturn, Law Centres campaigned publicly for the introduction to Scotland of another English and Welsh idea: pre-action protocols in mortgage arrears repossession cases. These protocols were not compulsory but provide a basis for good practice. As the debate developed, Law Centres and national homeless charities proposed the introduction of Pre-Action Requirements directly into court process. This innovation was a significant advance on the English arrangements.

To its credit the Scottish Government took up this idea and set up a broadly based Working Party to look into this and related issues arising from the downturn LSA served on this. The Working Party looking at housing problems was chaired by Adrian Stalker who is also the author of this booklet. LSA gratefully acknowledges all of his hard work.

Paul Brown, CEO, LSA

Mortgage Repossessions: The New Law

This booklet describes recent changes to the law made by Part 1 of the Home Owner and Debtor Protection (Scotland) Act 2010. Those changes were introduced by the Scottish Government to offer additional protection to mortgage borrowers faced with repossession proceedings. That protection was thought to be necessary, because the economic downturn may lead to more people losing their homes, if they cannot afford to pay their mortgages.

The changes made by the Act have three purposes:

- To impose duties on mortgage lenders to assist borrowers and give them advice, before repossession proceedings are raised in Court.
- To ensure that all cases call in Court.
- To simplify the procedure in repossession cases, and make it easier for mortgage borrowers to defend those cases.

The changes made by the 2010 Act apply to property that is used “to any extent for residential purposes”. If the property, or part of the property, is used as a home by a person residing in it, then the protections of the new legislation apply.

LSA have produced a leaflet called **Problems Paying Your Mortgage?** If you have mortgage arrears, you should also read that leaflet. It contains valuable information about what to do, if you fall into mortgage arrears.

The most important step you can take is to **get advice as soon as possible**. If you do nothing, you may lose your home through repossession in the sheriff court. With advice and help, you might be able to prevent that from happening. Even if you don't want to stay in your home, getting advice will help you to have more control over when you leave, and how much money you owe to the lenders.

The law and practice of defended repossessions can be very complex. A homeowner in difficulties will almost certainly need money advice to ascertain the best ways to manage their income and to pay essential creditors, including the mortgage. Homeowners may benefit from independent financial advice to establish whether switching mortgages may benefit them as well as to review

other commitments and assets. Benefits may require to be reviewed and the Mortgage to Rent Scheme considered. Homeowners, if an action is raised in court, will almost certainly require to instruct a solicitor. If a sale is necessary, a solicitor is required too.

If in doubt, the Law Society of Scotland on 0131 226 7411 can provide contact details for local Legal Aid and conveyancing lawyers.

LSA, through its team of lawyers, provides advice and representation in defended repossessions. This covers all relevant Court procedures. LSA also tackles other areas of relevance, including Mortgage to Rent applications. LSA will also make a referral where appropriate for benefits and money advice.

You can contact LSA lawyers:

- Legal Services Agency for anyone, anywhere in Glasgow: phone 0141 353 3354 for an appointment or call in at LSA's free drop in surgeries. Free drop-in surgeries. The main ones are on Wednesday 11:00 am to 12:30 pm or 2:00 pm to 4:00 pm or Thursdays 4:45 pm to 6:45 pm. LSA's main office is at Fleming House, 3rd Floor, 134 Renfrew Street, Glasgow, G3 6ST, www.lsa.org.uk
- LSA's Inverclyde Housing Rights Project for anyone anywhere in Inverclyde: phone 01475-725-665 for an appointment or call in at The Housing Rights Project drop in surgery from 10:00 am to 1:00 pm on Tuesdays and Thursdays at LSA's Inverclyde Housing Rights Project is at 9 Sir Michael Street, Greenock, PA15 1PQ, 01475-725-665.
- You can access other lawyer and advice networks too (see pages 9–10).

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Telephone Number: 0141 353 3354

The new duties for mortgage lenders, before they raise proceedings

Mortgage lenders now have a duty to give borrowers certain advice and information, before they raise repossession proceedings in court. They also have a duty to try to reach an agreement with the borrower so that the borrower to put things right. If the lenders do not perform these duties, the Court may refuse to grant an order allowing the repossession.

Information

Before raising a repossession action, the lender must provide the borrower with clear information about:

- (a) The terms of the standard security. The standard security is the legal document which the borrower signs when entering into the loan. It is an agreement that the borrower's home is to be security for the loan. This means that if the loan is not repaid, the lender can then repossess the house, and sell it to pay the loan.
- (b) The amount due to the creditor under the standard security, including any arrears and any charges for late payment, or charges for paying off the loan early. This amount should be broken down, so as to show the total amount of arrears and the total outstanding amount, including any charges.

Before raising proceedings, the lender must also provide the borrower with information about agencies that provide advice and assistance on managing debt. The lender must also encourage the borrower to contact the local authority in the area where the house is situated. That is because the local authority has a duty to offer advice and assistance to anyone who may be threatened with homelessness. Once a lender has decided to raise court proceedings it must tell the local authority which must ensure homeowners can get advice to try to prevent homelessness. If in doubt about where to go for help contact your local authority or a CAB.

Negotiation

Before raising a repossession action, the lender must make reasonable efforts to reach an agreement with the borrower in relation to future payments of the mortgage and arrears. These reasonable efforts must include:

- Making reasonable attempts to contact the borrower to discuss the arrears.
- Providing the borrower with details of any proposal which the lenders wish to make.
- Allowing the borrower reasonable time to think about any proposal made by the lenders.
- Where the borrower makes an offer that the lenders do not wish to accept, the lenders must inform the borrower why the offer has been rejected, within 10 working days of the offer being made.
- Considering whether any proposal, made by the lenders or the borrower, is affordable for the debtor.

The lender cannot raise proceedings if the borrower is taking steps which are likely to result in payment of the arrears, or payment of the whole sum due under the mortgage, within a reasonable time.

What is a reasonable period of time? What are reasonable efforts? The legislation uses the word “reasonable” because it is difficult for lawmakers to fix exact rules about what offer a borrower should make, or what a lender should accept. That is because each case is unique. An offer to pay say, £100 per month to the arrears may be reasonable in one case, but not reasonable in another case. It depends on all the circumstances. A skilled representative will help you make the best case.

If you are a borrower facing repossession proceedings because of mortgage arrears, you should definitely think about taking the following steps:

- Try to get advice on your financial position (on your debts, assets, income, benefits and tax).
- Don't make an offer that is unrealistically high. If you are thinking about making an offer to pay by instalments, you should be clear that you can keep up those instalments for the whole period when you'll be making payments.
- If the lenders refuse to accept your offer, you should still start to make payments at the level that you think you can reasonably afford. The lenders may still go to court and seek a repossession order. However, if you have been making payments, it will be easier to argue your case.
- Keep a record of communications with your lender. This may be helpful later.

What happens if the borrower makes an agreement with the lenders, and then fails to make a payment? In that case, the lenders will probably notify the borrower that they intend to raise repossession proceedings. The borrower then has 15 working days to make up the payment that has been missed. If he/she does so, the lenders cannot raise court proceedings. This rule only applies to the first payment that is missed under the agreement. If other payments are missed under the agreement, the lenders can raise court proceedings. But in practice, the lenders may still decide not to do so, if the missed payment is made up.

Notices

Before raising an action in court, the lenders have to serve various notices. If you are in mortgage arrears, you may find yourself receiving a lot of papers from the lenders, which could be quite confusing. In most cases, the letters and notices you receive will including the following:

- If you fall into arrears, you will be contacted by the lenders, by letter or otherwise, to discuss proposals to pay off the arrears.
- Because the lenders must provide you with information and try to negotiate with you (as described in pages 6–7) they will try to communicate with you, by letter or otherwise.
- The lenders will serve a document called a “calling up notice”. This is something that has to be done, before repossession proceedings can be raised.
- The lender may continue trying to negotiate with you after service of the “Calling-Up Notice”.
- Finally, you will receive the court papers, which will inform you of the date on which the case will call.
- Keep all these documents.

At any stage in this process, you can seek advice or help, or contact the lenders to talk about your situation.

You may feel that you are being “harassed” by the lenders, or bombarded with information. You should keep two things in mind. Firstly, the lenders do not want to repossess your house, if they can avoid it. For them, repossession means extra work, and possibly losing money. Secondly, many of the steps the lenders have to take are required by law, for the protection of borrowers, so that they can have the chance to avoid repossession taking place.

Proceedings in Court

All cases call in court

Under the old law, most repossession cases did not call in court on a particular day, unless the borrower made a special application. Under the new law, all cases must call in open court, before the sheriff. You will be informed of the date for the calling of the case, if repossession proceedings are served on you. For that reason, it is important to check any papers that are served on you. If you do not do so, you may miss the calling date for your case.

Representation

Before the law was changed in 2010, it could be difficult for borrowers to arrange representation in court. Arranging representation by a solicitor can be a problem. In some parts of Scotland, there are very few solicitors who take on this type of work. There can be an issue with paying for the services of a solicitor, if the borrower is not eligible for legal aid. (If you are receiving help and advice from the Legal Services Agency, initial advice and representation is always free. They will also be able to advise you whether you are eligible for Legal Aid.)

Under the new law, it is possible for lay persons (non-lawyers) to represent borrowers instead. It is expected that some workers in Citizen's Advice Bureaux, or in other advice agencies will be able to do this. Some sheriff courts have "In Court" advisors, who may be able to give the borrower advice if they attend at court without representation. One way or the other, it is always better to be represented by someone with the relevant expertise.

In Glasgow, you can access LSA's services by telephoning in advance for an appointment or call in at a drop surgery at LSA's Fleming House office or, alternatively, if all else fails, going to the Court on the day the action is calling and see LSA's "Mortgage Rights Desk" located immediately outside the Courtroom dealing with mortgage cases. Arrive early!

In Inverclyde, for Greenock Sheriff Court telephone LSA's Inverclyde Housing Rights Project on 01475725665 for an appointment or call in at a drop in surgery at LSA's offices at 9 Sir Michael Street, Greenock, PA15 1PQ. The surgery is from 10:00 am to 1:00 pm on Tuesdays and Thursdays in LSA's offices.

In Glasgow there are other Glasgow Advice & Information Network (GAIN) organisations who can provide advice and representation. To access them telephone the GAIN telephone number on 0808 801 1011. Through this number you can also access money and benefit advice.

In many sheriff courts throughout Scotland there are in-court advice desks. In addition there are advice agencies in most areas.

For further information contact your local authority or Citizens Advice Direct advice helpline on 0844 848 9600 or Shelter Line, a free housing advice helpline on 0808 800 4444.

When the case calls in court

If you appear in court when the case calls, or arrange for someone to represent you, you can then ask the court not to make an order for repossession in favour of the lenders.

At this stage, the court must consider certain matters. These are:

- (a) the reason why the mortgage is in arrears.
- (b) the ability of the borrower to repay the arrears, as well as meeting the other obligations under the mortgage, within a reasonable time;
- (c) any action taken by the lenders to help the borrower in meeting those obligations;
- (d) where appropriate, participation by the debtor in a debt payment programme approved the Debt Arrangement and Attachment (Scotland) Act 2002; and
- (e) the ability of the borrower, and any other person residing at the home, to arrange reasonable alternative accommodation.

Because the court has to consider these matters, you or your representative should be prepared to explain why the mortgage is in arrears, and what proposals for repayment you have, at that time, or in the future.

Apart from the points listed at (a)-(e) above, the court may also consider any other matters that it considers to be relevant. That is because it cannot grant the repossession order unless it is reasonable to do so. This means that all of the relevant circumstances should be considered. To give an example, if the borrower or a member of her household is sick or disabled, that is a matter that the court might consider, in deciding whether to grant the order. The sheriff should be told about any matter that might be a factor in persuading the court not to grant the order

The orders that can be made by the court

The court could grant the order for repossession at the first calling of the case. That might happen where, for example, the court has decided that the borrower's offer to pay the arrears was too little, too late. This will not happen very often, particularly if you are represented by somebody with the relevant expertise. Under the old law, applications by borrowers to the court for time to pay off the arrears were successfully in about 90% of cases. **If you ask the court to give you time to pay off the arrears, your request will probably be granted.**

Alternatively, more rarely, the court could refuse to grant the order, and dismiss the action. That might happen where the court was not satisfied that the lenders had taken the steps they were required to take by law, before raising the proceedings.

In other cases, the court might decide to continue the case to a calling on another date. Alternatively it might grant a "sist", which suspends the case without setting another calling date. A continuation or sist would usually be granted so that the borrower has time to make the repayments he/she has offered to make. If your case is continued to another date, it is very important that you make a note of that date, so that you can arrange to appear or be represented in court on the continued date.

If there is some dispute between the lenders and the borrower, for example a dispute about whether an offer by the borrower is reasonable, the court may fix a hearing (also known as a "proof") so that it can hear evidence, and then make a decision.

Finally, there will be cases in which the borrower does not appear at the first calling. In that situation, the court is likely to grant the order for repossession, if it is satisfied that the lenders have taken the steps they are required to take by law, before raising the action in court.

What happens after the case calls in court?

This depends on the outcome of the first calling.

If the repossession order has been granted, the lenders will start making arrangements to repossess the house. This will involve setting a date for the eviction of the borrower and any other person staying at the house. An eviction notice will be served on the occupiers by sheriff officers. It is still possible to negotiate with the lenders, after the court order for repossession has been granted. The lenders may be persuaded not to go ahead with the eviction. The court order can also be recalled by the borrower, or by an entitled resident (see below).

If the case has been continued to another date, so that payments to the arrears by the borrower can be monitored, the case will call again. On that date, the sheriff will want to know whether the agreed payments have been made. If they have been made, the sheriff may continue the case again or grant a “sist”. If the payments haven’t been made, the sheriff may give the borrower another chance, or he/she may grant the order for repossession.

Where the case is sisted, there is no set date when it is due to call again. It is as if the case is frozen. Nothing happens until either the lenders or the borrower make an application to the court for the case to call again. This might be made by the lenders, if the borrower fails to keep up the agreed payments. It might be made by the borrower, if all the arrears have been paid.

During the periods when the case is continued or sisted, the borrower may pay off all of the arrears. In that case, the court will then refuse to order repossession, and will dismiss the case.

If the court has fixed a hearing for evidence to be led (a “proof”), that will take place on the date set by the court. If this happens in your case, you are strongly advised to seek legal advice as soon as possible.

Recall

If you do not attend court at the first calling, and do not make any application to the court to pay the arrears, it is very likely that the repossession order will be granted.

Even in that case, it is still possible to prevent the loss of your home. At any time before the eviction takes place, if you neither appeared in Court nor were represented in Court at any point, you can apply to the court for the decree for repossession to be recalled. You can then make a proposal to the court, which will then deal with the case as described at pages 9–11 above. This type of application can only be made by a person once in each case.

A recall application can prevent the loss of your home at any time up to the date set for eviction.

You will almost certainly need help with a recall. It will help your lawyer/representative enormously if you take all the court documents with you to your first meeting. Court timetables and time limits are always very important: this is particularly so in recall cases. Act immediately!

If you appeared or were represented at any point in Court it appears that it is not possible to recall the decree. In these circumstances it may be possible to appeal. Get advice immediately: there is a 14 day time limit. Do not delay!

Of course, if you think you may have gone past this time limit you should still get expert legal advice.

Entitled residents

An “entitled resident” is a person (other than the borrower) whose sole residence, or main residence, is in the house which the lenders are seeking to repossess. To be an entitled resident, that person must also fall under one of these categories:

- He or she is the owner or part owner of the house (but is not the borrower under the standard security).
- He or she is the husband, wife or civil partner of the borrower.
- He or she lives with the borrower as husband and wife, or in a relationship which “has the characteristics of a relationship between civil partners”. This could include same sex partners.
- He or she used to live with the borrower as husband and wife, or in a relationship which “has the characteristics of a relationship between civil partners”, provided certain conditions are met. These are (a) the borrower no longer lives at the home; (b) the person claiming to be an entitled resident lived with the borrower for a continuous period of six months, up to the date on which the borrower stopped living at the house; (c) the house is the home of a child under 16, who is a child of the relationship between the borrower and the person claiming to be the entitled resident.

An entitled resident has certain rights to become involved in the repossession proceedings which have been raised against the borrower. He or she can apply to the court to continue the proceedings or make any other order that the court thinks fit, despite not being called as a defender in the case.

If you believe that you may be an entitled resident, you should think carefully before becoming involved in proceedings. Usually this will not be necessary, if the borrower is defending the case. Even if the borrower is not defending the case, and you wish to do so, it may be difficult for you to prevent an order for repossession being granted, if the mortgage is not being paid. It is best to seek specialist legal advice before making an application to become involved in the case.

Repossession cases not based on mortgage arrears

So far, this booklet has dealt with mortgage arrears cases. The vast majority of repossession cases are raised because the loan is not being repaid. But, the borrower also has other obligations: to keep the house in a good state of repair, to insure it, not to let it out to a tenant without the lenders' permission, and so on. If any of these obligations are breached, the lender could then raise repossession proceedings.

In those cases, the duties of the lenders, and the rights of the borrower, are broadly similar. The lender has to provide information to the borrower, and negotiate with the borrower to give him time to put matters right.

In any repossession proceedings, the borrower can make a proposal to the court as to how he will remedy the situation, and ask for time to do so.

What happens in the event that the action is successful and the lenders seek to sell the property?

Once the lenders have a court order for repossession of the property, they will usually seek to evict the borrower so that they can sell the house, and use the proceeds of sale to pay off the borrower's debt.

The lenders have a duty to advertise the sale of the property and to take all reasonable steps to ensure that the sale price is the best price that can reasonably be obtained.

If a sale takes place, the lenders will use the sale proceeds in this way. Firstly, they will pay their own expenses. Then they will pay off any secured debts which, by law, must be paid first. Then the lenders will pay off the amount due under the loan to them. Finally, they will pay off the amounts due to other lenders under any other loans which are secured on the property. Then, any remaining surplus is paid to the borrower.

It is important to understand that in a case where the borrower no longer wishes to remain in the property, **it is financially much better for the borrower to sell the property herself, rather than to have a repossession and sale carried out by the lenders.** Repossessed properties tend to sell at a much lower price. The expenses of the lenders in carrying out repossession and sale are often very high. Repossession may also adversely affect the borrower's ability to obtain credit in the future.

Expenses of proceedings

It is a condition of nearly all mortgages that the borrower must pay all of the expenses of the lenders in connection with the exercise of their powers under the agreement, including steps taken to repossess the property. This includes the legal expenses paid by the lenders to their own solicitors. These may include the cost of phone calls, letters and meetings as well as the formal Court costs. These are usually debited to the borrower's account with the lenders, so that the borrower owes not only the arrears, but the expenses as well.

These expenses can be quite considerable, especially in cases where repossession cases are defended. This is another reason why it is important to get advice, if repossession proceedings are to be raised against you. You may strongly wish to protect your home, and resist repossession. But, you need consider all of the financial implications, including the legal expenses involved in defending proceedings. If your prospects of paying off the arrears and the mortgage are poor, you may simply be adding to your debt if you defend the action, because you will have to pay the legal expenses. In that type of case, it may be better to ask the lenders to give you time to sell the house, or obtain a remortgage or arrange "mortgage to rent".

Discuss these issues with your advisor.

Voluntary Surrender

It is also possible for the borrower to voluntarily surrender the property to the lenders, if he/she no longer intends to occupy it. This requires the borrower to complete a document certifying that he/she consents to the lenders taking over possession of the property and selling it. A similar consent must also be signed by other persons who might be entitled to live at the property, such as the spouse or partner of the borrower.

The advantages of voluntary surrender are that (a) the arrears are no longer increasing, and (b) the lenders do not need to raise court proceedings, which reduces expense.

However, in most cases it is still better for the borrower to sell the property him/herself, if that is possible. If you are thinking about voluntarily surrendering the property, it is strongly suggested, as always, that you seek advice first.

If all else fails: possible homelessness

If it proves impossible to protect your home and you are threatened with or actually become homeless remember that you have rights as a homeless person. you may well have more rights than you think. The most important thing is to get advice as soon as possible. If you are or might become homeless contact your council or a local advice agency (Legal Services Agency in Glasgow and Greenock can help here).

In summary everyone who is homeless has a right to temporary (short-term) housing from the council even if they had their home repossessed. Many people also have the right to permanent (settled) housing. Get advice! Legal Services Agency has a free leaflet on Homelessness and the Law (available on our website for free download).

About Legal Services Agency

www.lsa.org.uk

We specialise in social welfare law including asylum, landlord and tenant disputes, mortgage arrears, homelessness, criminal injuries compensation, children's rights, mental health, community care, disability discrimination and dementia.

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A joint LSA and Glasgow Central CAB Project

LSA: A National Human Rights NGO.

LSA believes that whenever anyone's fundamental rights, interests or freedoms are threatened, they should have appropriate advice, assistance and representation.

We follow this principle by, generally, tackling the unmet legal needs of those in disadvantage: particularly those with mental ill health, or dementia, people who are facing homelessness or actually homeless, those victimised by crimes of violence or people with a significant social welfare law problem. We also advise and represent women with an unsettled immigration/asylum position who have suffered gender based persecution as well as refugee and migrant children and young people (up to the age of 25 years).

We undertake our work through all relevant courts and tribunals.

We publicise rights and remedies through publications and books as well as running an extensive education and training programme.

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