

Enforcing a Standard Security

A Shepherd and Wedderburn guide



INTRODUCTION

The procedure to be adopted in the enforcement of a standard security differs depending on whether the land secured is used to any extent for residential purposes or not. In this note we deal with securities over both residential and non-residential land but the emphasis is on residential property and the procedures that must be adopted in relation to that. Whilst a Security can secure performance of a variety of obligations this note deals with the obligation being a monetary one.

The law in this area was changed significantly as a result of the Home Owner and Debtor Protection (Scotland) Act 2010, which amended the previous enforcement provisions contained in the Conveyancing & Feudal Reform (Scotland) Act 1970 (the Act) to introduce additional obligations which a creditor must satisfy in relation to residential property.

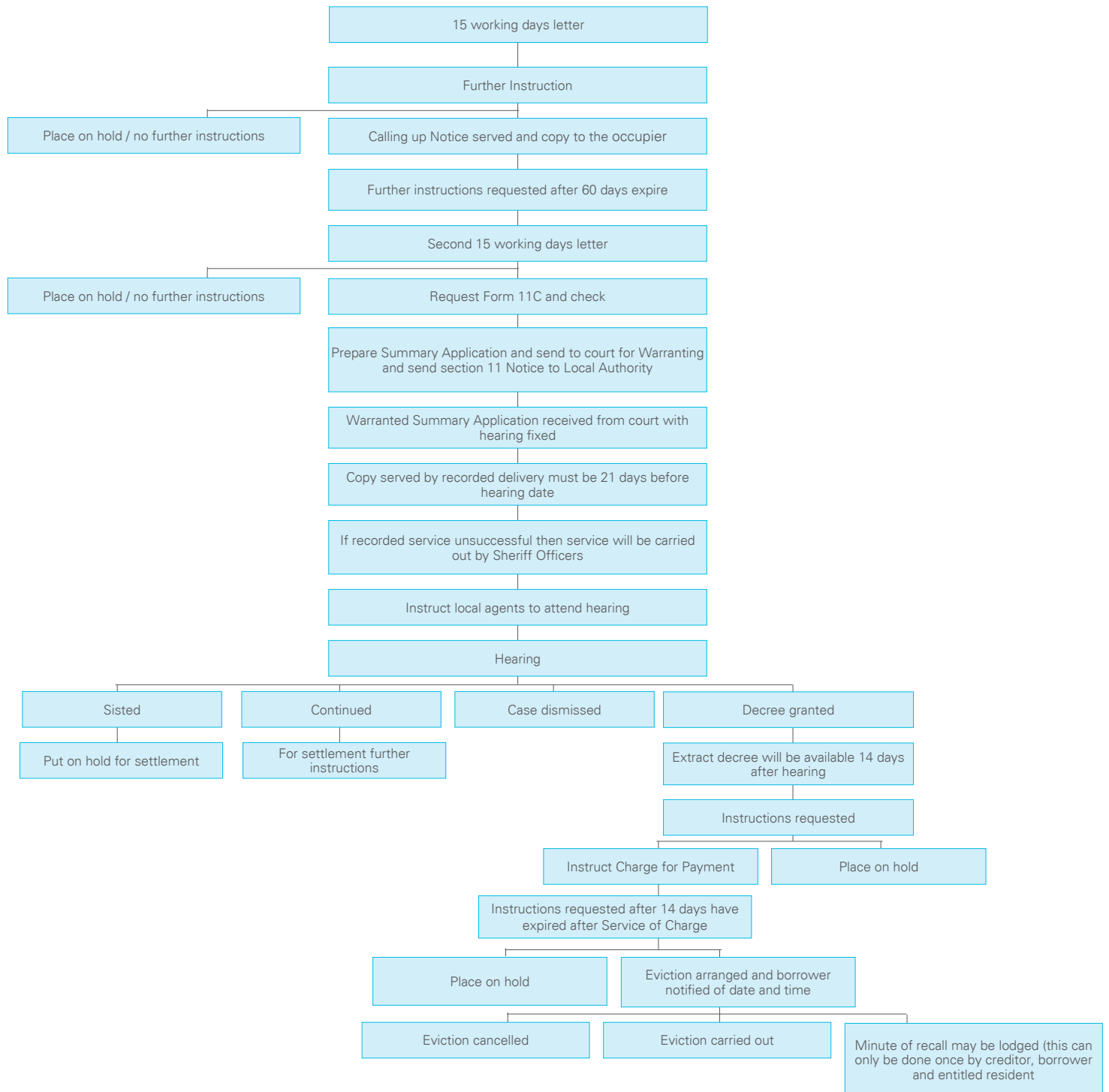
These are to afford further protection to debtors and to ensure that mandatory standards and a minimum level of approach is followed in all cases before proceedings to recover residential property are commenced.

A Supreme Court case (Royal Bank v Wilson [No 2] 2010 UK SC 50) also altered the procedure to be adopted in exercising powers of sale in cases involving a financial breach.

The most common breach of a standard security (i.e. a Scottish mortgage deed) for which a creditor would wish to exercise their remedies under the terms of the security will be the failure of the debtor to make payment. The creditor will generally wish to repossess the property with a view to sale. This will accordingly be the focus of this note, which reflects the law as at April 2015.



Typical Process of Enforcement over Secured Property





REMEDIES

Remedies under the Conveyancing & Feudal Reform (Scotland) Act 1970 (The Act) or the terms of the standard security itself are:

- Power to sell the secured property.
- Power to enter into possession of the secured property and receive rents.
- Power to let if possession is taken.
- Power to carry out necessary repairs.
- Power to apply for a decree of foreclosure.

The remedies of entering in to possession and selling the property can only be exercised in the case of a financial breach if the Calling Up procedure is followed, as detailed in the following section.

Power to carry out repairs and foreclosure (whereby the creditor itself acquires title to the secured property and is rarely used in practice as it can only be invoked where it has not proved possible to sell the property) are available on the expiry of a Calling Up Notice or a Notice of Default.

CALLING UP

A calling up notice is served requiring payment of the principal sum with interest within two months of date of service of the demand.

The notice is in a statutory form. Service of the notice must be on the person last holding legal title to the secured property and appearing on the relevant land register as the proprietor. It can be served by recorded delivery or registered post to the debtor's last known address or delivered to the person and an acknowledgment in statutory form signed by the person on whom delivery is made or a postal receipt of service shall be sufficient evidence of service of the notice. Forms C and D of Schedule 6 to the Act must be completed. Service cannot be made by Sheriff Officer leaving the notice. In addition, for residential properties a notice with a copy of the Calling Up Notice must be sent to the subjects addressed to 'The Occupier'.

If the notice is returned with intimation that it could not be delivered, or where the debtor's whereabouts are unknown or if it is not known if he is still alive, service must be made on the Extractor of the Court of Session.

Where the person having the last recorded title to the security subjects is an incorporated company which has been removed from the Register of Companies, or where a person deceased has left no representatives, the Calling Up Notice shall be served on the Lord Advocate.

Where the person having the last recorded title to the security subjects has been

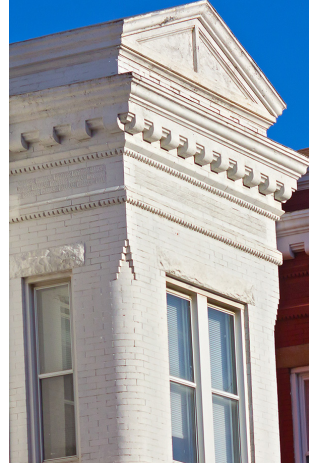


sequestrated, the notice shall be served on the trustee in the sequestration unless the trustee has been discharged, as well as on the bankrupt.

If the proprietor is a body of trustees then it shall be sufficient to serve on a majority of the trustees.

The creditor must serve a copy of the Calling Up Notice on any other person against whom he wishes to preserve any right of recourse in respect of the debt.

The Calling Up Notice is signed by the creditor or its agent. There is a rebuttable presumption that the officer of the creditor who signs the notice has authority to do so. In practice it is prepared by a law agent and signed by them. Sometimes the terms of the contract between the parties (ie the loan documentation) provides that the sum outstanding should be set out in a statement signed by a person within a designated class of authorised persons.



INACCURACIES IN THE CERTIFICATE

Inaccuracies in the certificate of indebtedness such as a person signing who was not the designated class of persons specified do not necessarily render the calling up notice void.

The court has held that in such a case the deficiency did not affect the validity of the Calling Up Notice. However an error in the manner of execution of the Calling Up Notice itself might be fatal.

EXPIRED CALLING UP NOTICE

Once the two-month notice period has expired without payment the creditor must raise court proceedings and obtain a decree against the debtor if the land is used for residential purposes. If there is no residential use, the creditor can rely on the expired notice as giving him right to exercise the powers of a heritable creditor. There are certain exceptions to the need for court action where there is residential use in respect of unoccupied residential premises but these involve meeting certain conditions which are difficult to satisfy and are not further addressed in this note.

For residential premises the creditor must raise the action in the relevant Sheriff Court under s. 24 of the Act. This is done by summary application and must be signed by a solicitor entitled to appear in the Scottish Courts.

For non-residential premises it is sometimes necessary to raise court proceedings in order to obtain vacant possession. Such an action can be raised as an ordinary Action and will seek a declarator that the heritable creditor is entitled to exercise his rights by virtue of the expired Calling Up Notice and for Warrant to Eject.



SECTION 24 APPLICATION

Under this section, the creditor may apply to the court in respect of residential property only when certain pre-action requirements imposed by s.24A have been complied with. These pre-action requirements are very similar to the pre-action protocol requirements in England and Wales but are statutory and fully enforceable.

Pre-Action Requirements

1. The creditor has to provide the debtor with clear information as to:
 - 1.1 the terms of the Standard Security;
 - 1.2 the amount due to the creditor under the Standard Security including any arrears and any changes in respect of late payment or redemption; and
 - 1.3 any other obligation under the Standard Security in respect of which the debtor is in default.
2. The creditor must make reasonable efforts to agree proposals with the debtor in respect of future payments to the creditor under the Standard Security and the fulfilment of any other obligation under the Standard Security of which the debtor is in default.
3. The creditor must not make an application if the debtor is taking steps which are likely to result in:
 - 3.1 the payment to the creditor within a reasonable time of any arrears or the whole amount due to the creditor; and
 - 3.2 fulfilment by the debtor within a reasonable time of any other obligation under the Standard Security.
4. The creditor must provide the debtor with information about sources of advice and assistance in relation to the management of debt.
5. The creditor must encourage the debtor to contact the local authority in whose area the secured property is situated.
6. In complying with these requirements the creditor has to have regard to any guidance issued by the Scottish Ministers.

The court will not grant the order unless satisfied that the creditor has complied with these pre-action requirements and it is reasonable in the circumstances to do so. The court will have regard to the following matters in assessing 'reasonableness' in relation to such an application:

1. The nature and reasons for default.
2. The ability of the debtor to fulfil within a reasonable time the obligations under the Standard Security in respect of which they are in default.
3. Any action taken by the creditor to assist the debtor to fulfil those obligations.
4. Where appropriate, participation by the debtor in a debt payment programme approved under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002.
5. The ability of the debtor and others residing at the property to secure alternative accommodation.

If the land is used for residential purposes the action is brought as a Summary Application and a hearing is fixed in every case. At the hearing the case can be continued, sisted, dismissed or decree granted. After decree is granted Sheriff



Officers are required to serve a Charge with at least 14 days' notice to remove on the debtor which gives a final chance to pay the debt, failing which an eviction will take place. Sheriff Officers must be instructed to carry out the eviction.

They are obliged to make an inventory of possessions left in the secured property following eviction. They will change the locks and if the debtor does not co-operate the Sheriff Officers will call the police for assistance. Once eviction takes place the decree is considered implemented.

APPLICATION TO COURT BY ENTITLED RESIDENT

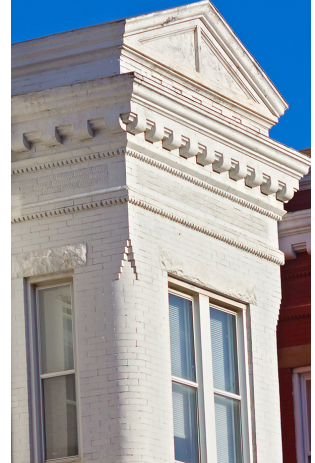
When proceedings are raised, an 'entitled resident' can apply to the court to continue the proceedings or make any other order it thinks fit. When considering such an application, the court will look at the same factors as those detailed above where the debtor is represented. A tenant is not an entitled resident.

An entitled resident is someone whose sole or main residence is the secured property (in whole or in part) and who is:

1. the proprietor of the secured property (where it is not the debtor); or
2. the spouse of the debtor or proprietor of the property which is in whole or in part a matrimonial home; or
3. the civil partner of the debtor or proprietor of the property which is in whole or in part a family home; or
4. a person living with the debtor or proprietor as husband and wife; or
5. a person living with the debtor or proprietor in a relationship which has the characteristics of a civil partnership; or
6. a person who lived together with the debtor or proprietor in a relationship where they were living together as husband and wife or as civil partners (but not married or having a registered civil partnership) if:
 - 6.1 the secured property is not the sole or main residence of the debtor or the proprietor,
 - 6.2 the person lived with the debtor or proprietor for 6 months ending with the date on which the property ceased to be the sole or main residence of the debtor or proprietor, and
 - 6.3 the secured property is the main or sole residence of a child under age 16 who is the child of both parties of the relationship.

Lay Representation

Debtors and 'entitled residents' are entitled to employ lay representation although this must be approved by a prescribed body or of a prescribed description. Scottish Ministers have specified the approved bodies in the Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010.





Bodies of a prescribed description are:

1. Those entered on register of advice organisations established and maintained by the Scottish Legal Aid Board under s.12A of the Legal Aid (Scotland) Act 1986.
2. Those accredited at Type III level against the Scottish National Standards for Information and Advice Providers in the areas of competence of mortgages/ secured loans.
3. Councils constituted under s.2 of the Local Government etc. (Scotland) Act 1994.
4. Citizens Advice Bureaux entered in their register of member bureaux maintained by the Scottish Association of Citizens Advice Bureaux – Citizens Advice Scotland.

Recall of decree

In respect of residential property, the creditor, a debtor who did not appear or was not represented at the court hearing or an 'entitled resident' who did not make an application in the proceedings can apply to the court for recall of decree any time before the decree has been fully implemented. Each can only apply once.

RECOVERY OF THE SUBJECTS

In respect of residential premises once the creditor has obtained the decree he can exercise his rights to enter into possession and uplift rents, to repair and/or to sell the subjects. For non-residential properties where vacant possession is not required there is no need to obtain a decree as the rights arise on the expiry of the calling up notice.

Sale may be by private bargain or public auction.

The creditor is under a duty to advertise the sale and to take all reasonable steps to ensure that the price at which all or any of the subjects are sold is the best that can be reasonably obtained.

There are no fixed rules regarding advertising. Regard must be had to individual circumstances and the duties of creditors.

The sale proceeds are held in trust and must be applied in order of priority as set out in s 27 of the Act. Entering into possession means essentially standing in the shoes of the proprietor. Leases of up to seven years can be granted and if a longer period is sought the creditor can ask the court for permission. Rents may be uplifted.

With possession may come liabilities. This note does not cover this in full but it is worth noting that a creditor may incur occupiers liability or environmental liability once they enter into possession.



It is not necessary to enter into possession to sell the property. What is meant by 'entering into possession' is very fact specific and will turn on its own set of circumstances. Accordingly, a creditor who does not wish to be treated as having 'entered into possession' of a secured property must be careful about the amount of control that they exercise in relation to that secured property. Conversely changing the locks and securing vacant possession does not necessarily mean that a creditor has entered into a possession in the legal sense.

GLOSSARY OF TERMS

Decree	Judgment
Sheriff Court	The court in which actions relating to the enforcement of the borrower's personal obligation or the Standard Security is raised
Sheriff Officers	Similar to process servers, they are entitled to serve writs, enforce decrees etc. They also carry a useful database and will often give information on debtors
Sist	Equivalent to 'stay', i.e. freeze of the action
Standard Security	The charge document signed by the borrower. This will frequently include the personal obligation which is secured over the particular subjects. It requires to be registered in the applicable Scottish land register (either the Register of Sasines or the Land Register of Scotland)
Summary Application	The court procedure whereby the writ raising an action is presented to court and the court fixes a hearing at which the defender is called to appear or be represented
Ordinary Action	The court procedure in the Sheriff Court whereby the writ raising the action is served on the defender and he has 21 days to intimate if he intends to defend the action and a further 14 days to lodge written defences

For further information please contact:



Elaine Brailsford
Partner
T +44 (0)131 473 5287
M +44 (0)781 466 8481
E elaine.brailsford@shepwedd.com



Gillian Carty
Partner
T +44 (0)131 473 5138
M +44 (0)785 073 8370
E gillian.carty@shepwedd.com



Gina Johnston
Assistant
T +44 (0)131 473 5317
M +44 (0)791 279 9606
E gina.johnston@shepwedd.com



Serena Weir
Assistant
T +44 (0)131 473 5682
M +44 (0)770 347 1757
E serena.weir@shepwedd.com