

MORTGAGE RIGHTS (SCOTLAND) ACT 2001

EXPLANATORY NOTES

THE ACT

Outline of the Act

Section 2 Disposal of application

13. Where the court considers it reasonable in all the circumstances, the court may under this section, suspend the creditor's rights to such extent, for such period and subject to such conditions as it thinks fit and/or, in the case where the application is made during proceedings under section 24 of the 1970 Act or section 5 of the 1894 Act, continue the proceedings to such date as it thinks fit. In effect, this allows the court—
 - to give the applicant reasonable time to remedy the default, where (in the view of the court) the applicant is likely to be able to achieve this, or
 - to give the applicant and others staying at the property sufficient time to arrange alternative accommodation and avoid risking homelessness.
14. In reaching its decision, the court will take into consideration particular factors in the overall circumstances of the case. These particular factors are the nature and the reason for the default by the debtor; the ability of the applicant to fulfill within a reasonable period the obligations under the standard security which the debtor has defaulted on; any action by the creditor to help the debtor fulfil these obligations; and the ability of the applicant and any other person living in the property to arrange alternative accommodation, thus avoiding the risk of homelessness.
15. Where the applicant clears the default while an order is in force, the standard security has effect as if the default had not occurred.
16. A calling-up notice requires the debtor to repay the whole loan rather than simply make good any arrears or rectify any other forms of default. In this case the “default” is the failure to comply with the notice. As such, if the court decided to give the applicant time to remedy the ‘default’, the applicant would be required to repay the whole sum borrowed and any interest, which for most debtors would be extremely difficult. So by opting to serve a calling-up notice rather than a notice of default, a creditor would effectively deprive the debtor of the opportunity of obtaining an order allowing time to clear the arrears or otherwise rectify any default. The effect of *subsection (4)(a)* is that the court may suspend enforcement of the calling-up notice until the notice expires under the 1970 Act. By attaching conditions to the order the court can thus allow the applicant to repay the arrears only, rather than the whole debt as required under the calling-up notice.
17. The section also allows the creditor or the applicant to apply to the court to change the terms of the order or revoke it, or further to continue proceedings to a future date.