
EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes transitional and saving provisions in connection with the coming into force of the provisions of the Home Owner and Debtor Protection (Scotland) Act 2010 (“the Act”).

Article 4 provides that where an application has been made to court before 30th September 2010 the existing arrangements under the Heritable Securities (Scotland) Act 1894 (“the 1894 Act”), the Conveyancing and Feudal Reform (Scotland) Act 1970 (“the 1970 Act”) and the Mortgage Rights (Scotland) Act 2001 (“the 2001 Act”) continue to apply in respect of that application.

Article 5 applies where a calling-up notice or notice of default has been served before 30th September 2010. In such circumstances, the requirement introduced by the Act, that the creditor make a court application for warrant to exercise rights on default, does not apply. This means that the creditor may continue to enforce such a calling-up notice or notice of default without going to court. The rights of debtors and certain others under the 2001 Act are preserved in this situation by virtue of article 5(a).

However, should the creditor choose to apply to court after the relevant date, the provisions of Part 1 of the 2010 Act will apply and the procedure for court applications introduced by the Act must therefore be followed (article 5(b)).

Article 6 provides for a situation where the default occurs before 30th September 2010, but the court action is raised on or after that date. the Act imposes pre-action requirements that must be complied with as soon as is reasonably practicable after the default. Transitionally, those requirements are modified to require compliance as soon as reasonably practicable on or after 30th September 2010, where the material has not already been provided.

Article 7 makes transitional and saving provisions in respect of the commencement of Part 2 of the Act. Article 7(1) makes a transitional provision in respect of debtor applications so that these are still competent by the creditor concurrence route provided the creditor concurrence is prior to the repeal of that route and the application is received by the Accountant in Bankruptcy within 30 days after the repeal. Article 7(2) makes a transitional provision in respect of trust deeds entered into before the amendments to trust deeds come into force. They are not affected by the amended law. Article 7(3) has the effect that sequestrations awarded prior to the commencement of section 12 of the Act still require to be advertised in the Edinburgh Gazette. There is no transitional provision in respect of section 11 of the Act, so that its provisions impose duties on all trustees in sequestration and of trust deeds in respect of all unsold rights in a family home.