

Briefing

Written evidence on Stage One of the Bankruptcy and Diligence Bill

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Shelter

Written evidence at Stage One of the Bankruptcy and Diligence Bill

Shelter's evidence centres on the potential for increased homelessness as a result of specific provisions contained in the Bill. This is at a time when Scotland's efforts to tackle homelessness have gained international plaudits.

Land attachment diligence

Shelter urges the Committee to recommend that the Bill be amended to:

- **exclude the debtor's main dwelling from the scope of the proposals on land attachment.**
- **increase to £10,000 the prescribed level at which a warrant for sale may be applied for.**
- **include a provision to the effect that a warrant for sale may only be granted where the court considers it to be reasonable in all the circumstances of the case to do so.**
- **include a procedure, analogous to reponing in ordinary cause actions, in terms of which a defender who has not entered appearance in the warrant for sale proceedings may apply, up to the date of eviction, to have the warrant for sale recalled, in order that the court may consider his argument against such a warrant being granted.**

Shelter is concerned about the potential for increased homelessness as a result of the provisions introducing a land attachment diligence. The proposals would give a creditor the right to apply for a decree which would give real right over heritable property (a person's home) in order to secure a debt due. We have three specific concerns regarding the proposed statutory scheme.

1. The level of debt is too low

Firstly, the creditor may seek a warrant for sale of attached land where total debt is as low as £1,500.¹ It should be noted that the original debt may be significantly smaller, but could be increased above the prescribed level by court expenses, sheriff officers fees and so on. Clearly the vast majority of consumer debts, including credit card bills, personal loans,

¹ Land – including a debtor's main dwellinghouse – can be attached for a debt of any amount, however the house cannot be sold unless the debt is at least £1,500.

and overdrafts for relatively small sums of money would be capable of leading to the debtor losing his home by way of land attachment. We understand that there may be a suggestion that it is logical to tie in the threshold level for land attachment with the level at which an order for sequestration may be granted.

2. There should be a 'reasonableness' test for warrants for sale

Secondly, the matters that the court is able to consider before granting a warrant for sale are unnecessarily restrictive, and favourable to the creditor. Clauses 86(3) and 87(4) and (5) outline the circumstances in which the court has the power to decline to grant a warrant for sale of attached land. In terms of clause 86(3) the sheriff may decline to grant the warrant if he considers that it would be 'unduly harsh' to do so. Clause 87 deals with applications for a warrant for sale in which the land attached comprises or includes a dwellinghouse which is the sole residence of the debtor or other specified persons (e.g. the debtor's spouse or child). In terms of clause 87(5) the sheriff is entitled to take into account four factors in deciding whether to grant the warrant:

- the nature and reasons for the debt
- the debtor's ability to pay
- any action taken by the creditor to assist the debtor in paying
- the ability of the occupiers of the dwellinghouse to obtain reasonable alternative accommodation.

These are the same four factors that are listed at section 2(2) of the Mortgage Rights (Scotland) Act 2001, as being matters that the court may consider in deciding whether to suspend the rights of heritable creditor to carry out a mortgage repossession in relation to an application made under the 2001 Act. Clearly a hearing under section 2 of the 2001 Act is analogous to a hearing under clause 87 of the current Bill: in both cases, the Court requires to consider whether a creditor should be able to force the sale of his debtors home in order that the debtor's obligations to the creditor can be met. However, we wish to point out that there is a significant difference between section 2(2) of the 2001 Act and clause 87(5) of the Bill. Section 2(2) begins with the words:

"2(2) The court may make an order under this section only where it considers it to be reasonable in all the circumstances to do so; and the court, in considering whether to make such an order and what its terms should be, is to have regard in particular to: [the provision goes on to state the factors listed above]."

That wording does not appear in clause 87. This is an extremely important omission. In relation to hearings under section 2 of the 2001 Act, the effect of the wording of the section is that the court is directed to have regard to all of the matters that might be

relevant (by use of the words in italics); the court is also given a direction by the section that the four factors listed are always to be regarded as relevant, and should always be taken into consideration. The effect of the wording of clause 87 is entirely different. It directs the court to have regard to the four factors listed, and makes no other direction. **There is no provision empowering the court to look at any other issue which it might regard as being relevant to the application.** For example, let us say that the owner occupier wishes to oppose the warrant for sale on the basis that she has severe mental health problems which would be exacerbated by losing her home. This factor could clearly be considered by the court in an application under section 2 of the 2001 Act. It could not be considered in an application under clause 87, *because it is not one of the four factors listed*. It is our contention that the factors outlined in clauses 86 and 87 are unnecessarily restrictive, and favour the creditor.

We cannot understand what policy reasons dictate that the hearing under clause 87 should be weighed more favourably for the creditor, than the equivalent hearing under the 2001 Act in relation to mortgage repossessions. We would wish to emphasise that we are not suggesting that, for example, a person with mental health problems should not be the subject of the land attachment process. We are merely proposing that this is a factor which the court should at least be permitted to take into consideration.

3. There is no provision to recall a decree in the interests of justice

Thirdly, we are concerned that the process outlined in the Bill does not allow the debtor to revive the process between the point when the warrant for sale is granted, and an eviction takes place. It is the experience of Shelter, and of all agencies that deal with persons with debt problems, that a large proportion of debtors do not seek advice, and do not engage with legal processes until the last minute. There are a number of reasons why debtors do not seek help. However, mental health problems, particularly depression, are an especially common reason for a failure to cope with paperwork and financial matters. Shelter's assistance of clients threatened with eviction is largely dependent on our ability to revive court processes in which an order for eviction has been granted against a client, in mortgage or rent arrears, who did not engage with that process. This is done by lodging an application with the court, explaining why the debtor did not appear in the court action, and outlining the basis on which he wishes to defend the proceedings.² This type of procedure has evolved over time. It is based on the recognition that it is in the interests of justice that a person should be allowed to revive a court process where he has a reasonable excuse for failing to appear, and a case which the court ought to determine.

² In Summary Cause actions this type of application is known as a 'Minute for Recall'. In Ordinary Actions the application is called a 'Reponing Note'. In Summary Causes the application must be granted by the court. In Ordinary Cause actions, the court has a discretion as to whether to grant the application. However, in most cases, the application is granted. In both procedures, the application can only be made on one occasion. Summary Cause procedure is used for the vast majority of evictions of tenants. An action for mortgage repossession is raised by Ordinary Cause.

There is no scope for such an application to be made in the procedure outlined in the Bill. This creates a potential for injustice. It means that where the debtor has a strong basis for opposing the application, but has, for a very good reason, failed to enter the process, the debtor's case could not be heard. We accept that there must be a cut-off point at which it is too late for the debtor to get back into the court process. We would suggest that this point should be up to the date of the eviction. That would be in line with other court processes which lead to eviction.

We would suggest that the factors outlined in the two paragraphs above have the effect of making the procedure under the Bill more favourable to the creditor than equivalent processes for eviction of persons in rent and mortgage arrears. Again, we cannot understand what policy reasons dictate that this should be the case. If anything, common sense would suggest that the process leading to eviction under land attachment should be more difficult. This is because the debtor's meeting rental or mortgage payments is at least clearly related to his being able to remain in his home. One would therefore expect that the case for eviction of a tenant not paying his rent, or a homeowner not paying his mortgage, would be more compelling than the case that might be made for the eviction of a person who cannot pay his car loan or his credit card bill. The legislation ought to reflect this.

Undermining efforts to prevent homelessness

Preventing and tackling homelessness is a priority for the Scottish Executive³, and the Parliament has won an international human rights award for its homelessness legislation⁴. This Bill undermines Scottish Executive policy on prevention of homelessness, by creating the potential for an increase in homelessness. In rent arrears cases, where there are statutory grounds of recovery of possession for outstanding rent, there is no evidence whatsoever to suggest that the threat of eviction impacts on an individuals' ability to repay debt.

Many of the causes of homelessness are hard to address through public policy. Homelessness can be the result of a multitude of factors such as relationship breakdown, threat of violence or abuse, or chaotic lifestyles. It is particularly difficult to design services and support to address these problems and prevent them leading to homelessness. Where we have the clear and straightforward opportunity in public policy to prevent the possibility of homelessness, we have the responsibility to ensure that we do so.

³ Scottish Executive (2005) Homes for Scotland's People: A Scottish Housing Policy Statement. Para 2.31.

⁴ Since devolution, the Scottish Parliament has broken new ground in tackling homelessness and set a standard for the rest of the world to follow. The Homelessness (Scotland) Act 2003 has been widely acclaimed as the most progressive piece of homelessness legislation in Western Europe and in 2003, Scotland was awarded an international human rights award for its approach to homelessness.

Exempting a principle home from the land attachment diligence is just such an opportunity.

In our response to the consultation on this legislation we indicated our opposition to land attachments including the debtor's home, and we met with the Scottish Executive to discuss our concerns in January last year. Shelter is pleased to see that a number of protections have been introduced to the sale stage of the diligence, nevertheless we are disappointed that the main dwellinghouse has not been excluded. For the reasons stated above, we are very concerned that the land attachment process will lead to a new stream of homelessness.

Shelter strongly supports the evidence provided to Committee by Citizens Advice Scotland⁵. We would like to draw the Committee's attention to the following points:

- It is uncertain whether the diligence will lead to many actual sales taking place, however, we are concerned that many creditors will use the first stage of land attachment as a threat to the debtor. Creating the possibility of losing their home may force people to try to pay the debt by whatever means they can. This could lead to debtors agreeing to unsustainable repayment plans. Effectively land attachments will provide creditors with a powerful means of manipulating debtors in order to elicit payment⁶.
- The new diligence effectively turns an unsecured loan into a secured one. Secured loans normally require the explicit consent of a debtor and in addition, debtors usually get the benefit of preferential interest rates. This new diligence will effectively provide creditors with the ability to reap the benefits of charging high levels of interest, yet still get their risk secured through the back door by using a land attachment in the event of default. If this diligence is introduced and remains applicable to the main dwellinghouse, this risk will now effectively apply to all debts – secured or not. Without explicit guidance on all loans and credit, from store cards to car loans, many debtors will not be aware that they put themselves at risk of losing their home.

Finally, as an ancillary matter, we note that there is no provision in the Bill which deals with the issue of what is to happen if a dwellinghouse subject to a warrant for sale has been let to a tenant under an assured tenancy in terms of the Housing (Scotland) Act 1988. That may lead to a situation in which the creditor obtains a warrant to sell subjects, but then finds that he cannot effect an eviction, because the tenancy cannot be ended except in accordance with the provisions of the 1988 Act.

⁵ Citizens Advice Scotland (2006) Bankruptcy and Diligence (Scotland) Bill: A Briefing to the Enterprise and Culture Committee by Citizens Advice Scotland.

⁶ Charging orders are the English equivalent of land attachment and as Citizens Advice Scotland identify, their use is on the increase – rising by 178% over the last five years

Bank arrestments and Local Housing Allowance

We strongly support the comments made in the evidence submitted by Citizens Advice Scotland in relation to the impact of bank arrestment diligence on people in receipt of local housing allowance⁷. We join them in expressing our serious concerns about the potential impact of bank arrestment leaving a debtor unable to pay their rent and at risk of homelessness. This situation is of particular concern in the context of Local Housing Allowance which is currently being piloted in Scotland.

It is essential that the possibility of double diligence is prevented and that benefits and tax credits are protected from arrestment to ensure that the most vulnerable debtors in Scotland are protected from the harsh and unintended consequences of bank arrestments.

⁷ Citizens Advice Scotland (2006) Bankruptcy and Diligence (Scotland) Bill: A Briefing to the Enterprise and Culture Committee by Citizens Advice Scotland.