

HOME OWNERS SUPPORT FUND GUIDANCE NOTE



The Scottish Government

To: Lenders
Agents of Lenders (Solicitors)

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Guidance for Lenders and their
agents

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This guidance note is intended to assist UK Lenders and those acting on their behalf, such as solicitors, understand the Scottish Government's Mortgage Rescue schemes which are part of the Home Owners Support Fund (HOSF).

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1. Home Owners Support Fund: schemes

The Scottish Government operates two schemes as part of the Home Owners' Support Fund. These are:

Mortgage to Rent – this enables debtors to remain in their home by selling it to a local social landlord (housing association / local authority) at the open market value who will then provide a Scottish Secure Tenancy to them.

Mortgage to Shared Equity (MTSE) – this allows debtors to retain ownership of their home by selling a part share (up to 30% of the property value) to the Scottish Ministers, thereby reducing an element of their secured debt to a manageable level. The scheme allows the applicant to buy back the Government's share within 10 years. If they fail to do so, the Government would receive monies only in the event of its sale.

Both schemes may be steps that a creditor has to give the debtor time to explore, in accordance with the pre-action requirements set out in section 24A (4) Conveyancing and Feudal Reform (Scotland) Act 1970, as inserted by the Home Owner and Debtor Protection (Scotland) Act 2010.

2. Debtor protection law in Scotland and ranking agreements

Debtor Protection Law

In 2010, the Scottish Government introduced new primary legislation, the Home Owner and Debtor Protection (Scotland) Act 2010, aimed at increasing the protection for home owners facing repossession. This Act makes various amendments to the Heritable Securities (Scotland) Act 1894, the Conveyancing and Feudal Reform (Scotland) Act 1970 and Mortgage Rights (Scotland) Act 2001.

Before bringing an action for repossession, lenders are required to satisfy the court that they have considered reasonable alternatives to repossession by meeting certain pre-action requirements intended to help and advise home owners¹.

In accordance with section 5B(4) of the 1894 Act and section 24A(4) of 1970 Act respectively, creditors **must not** make an application to a court if the debtor is taking steps which are likely to result in payment etc. within a reasonable time.

The steps which are likely to result in payment within a reasonable time, are set out in article 4(1) of the Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010². These include that if a debtor can demonstrate in documentary evidence that an application to a mortgage support scheme, such as the Home Owner Support Fund, has been submitted and that the debtor has a reasonable expectation of being eligible for support; an application for possession must not be made.

Ranking Agreements

Mortgage to Shared Equity (MTSE) scheme rules require a Ranking Agreement be entered into among the commercial lender, Applicant and Scottish Ministers to regulate the relationship/priority of the Standard Security already granted by the Applicant to that commercial lender. Annex A to this guidance note explains this in more detail

3. End of term pilot

¹ This gives Scottish borrowers **protection on a statutory basis**, similar to protection offered by the non-statutory Pre-Action Protocol for Possession Claims based in Mortgage or Home Purchase Plan Arrears 2, which came into effect on 19 November 2008 in England and Wales.

² S.S.I. 2010/317.

During the period 1 April 2014 until 30 June 2017, a pilot programme will operate as part of the Mortgage to Rent scheme that will allow applications from debtors who have reached the end of their mortgage term and are unable to repay the principal sum.

To be eligible for this pilot, debtors must:

- be unable to fund the principal sum through any other means, such as re-mortgaging, loan, cashing of endowments/pension/life assurance policies etc.
- have sought advice from an Independent Financial Adviser on options to repay the principal sum. Evidence must be provided to support this
- Provide evidence that the mortgage term has ended and the date which the mortgage term ended

4. Repossession cases

Applications to the Home Owners Support Fund made by a debtor once a repossession decree (court order) has been obtained by the creditor will be treated with the highest priority and we will ask that your agents postpone any eviction proceedings to allow us to consider any application.

The Scottish Government accepts that, once a court decree has been granted, it is at the discretion of the creditor whether or not to agree to postpone the repossession or not to enforce the decree.

In the event a creditor agrees to postpone repossession, the Scottish Government will seek to determine whether the applicant is eligible for assistance as quickly as possible in accordance with the scheme timetable. This will involve establishing the open market property value, and finding a social landlord to purchase the property in Mortgage to Rent cases, or ascertaining the debtor's ability to maintain their home and secured debts that will not be repaid for Mortgage to Shared Equity cases.

The Scottish Government will ensure that:

- cases are closed where the debtor fails to co-operate with any reasonable request made by the Home Owner Support Fund
- cases are closed where the debtor fails to provide access to their home for the purpose of inspection within a reasonable time
- creditors are informed of the outcome of this determination, or closure of the case, as soon as it is possible to do so

If a creditor wishes to proceed with the repossession the case will close.

5. Determining the open market value

The single survey carried out by the scheme surveyors, First Surveyors, is a full physical inspection of the property, which is used to determine the open market value for the property. This is the value which a social landlord will be expected to

pay for the property, for Mortgage to Rent cases, or which the Scottish Government will use to calculate the value of the maximum stake it can take in the property (30% of the property value), for Mortgage to Shared Equity cases .

The property valuation provided by First Surveyors is final.

Copies of the full single survey report will normally be provided to creditors at the formal offer stage of the process or when requested at shortfall stage.

6. Redemptions

Once a social landlord willing to take on a property has been identified, in Mortgage to Rent Cases, or when eligibility has been determined for Mortgage to Shared Equity Cases, a full redemption statement will be required from creditors.

The Scottish Government will formally request redemption statements from creditors using the account information provided by the debtor. With this request it will provide a copy of a signed declaration from all owners allowing the request for information in accordance with the Data Protection Act 1998. Creditors should aim to **provide this within 14 days of the request being received**, to minimise any unnecessary charges and interest being accrued by the applicants, in accordance with the Financial Conduct Authority 'treating customers fairly' principles aimed at creditors.

The redemption statement should include all costs, including legal expenses and charges, to settle the account in full for the **secured** element of the account **only**.

Redemption statements should be valid for the **maximum** possible time, in accordance with the creditor's policy.

As the Scottish Government is acting on information provided by applicants, creditors are asked to ensure that account details are checked for accuracy against the mortgage agreement for the property.

7. Shortfalls

In the event that:

- the secured debt attached to the account (or the combination of the secured debt plus the debt of any creditor holding an inhibition) exceeds the open market value for the property
- the repairs necessary to bring the property to the necessary standard under the scheme exceed what can be funded by the Scottish Government, the social landlord or the applicant
- the repairs necessary to bring the property to the necessary standard are not eligible to be funded by the Scottish Government, and cannot be funded from elsewhere

a shortfall situation will arise.

In these circumstances, cases will be suspended while the debtor and their money advisor negotiate an agreement with their creditors to repay the shortfall figure. **The Scottish Government will not be involved in these negotiations.**

If an agreement is reached, the Scottish Government will require written confirmation from the creditor that this is in place before the case can progress.

It is in the interests of all creditors to reach a decision on potential shortfall agreements as soon as possible to allow the Scottish Government to either progress or close the case, thus discharging the pre-action requirements under the Home Owner and Debtor Protection (Scotland) Act 2010 and in accordance with the Financial Conduct Authority 'treating customers fairly' principles.

To assist creditors with any shortfall negotiations, the Scottish Government will provide a copy of the Single Survey report if required.

Where possible the shortfall agreement should include some flexibility to factor in sufficient time to complete the case and for the formal conveyancing process to be carried out by the Scottish Government's scheme solicitors.

In the event that a shortfall arises at the conveyancing stage, the case will be held by the Scottish Government until an agreement is reached.

8. Formal offer

A formal offer will only be made to a debtor where the Scottish Government is satisfied that it has obtained all necessary information, including planning consents, redemption figures, and in a Mortgage to Rent case has identified a social landlord committed to purchasing the property.

A formal offer will be made to all parties involved in the application, and will include a copy of the property single survey and any updated valuations.

The offer letter to creditors will stipulate:

- the debtor's application has been assessed as successful
- which parties are involved in the transaction
- the property value as set out in the single survey report (updated every four months). A copy of this report will be included with the offer letter
- the price which the social landlord will pay for the property (if Mortgage to Rent)
- the amount of secured debt owed to the creditor
- any shortfall agreement reached with the creditor (if applicable)

To avoid any unnecessary delay, creditors are asked to sign and return the offer letter if they agree to the terms within 14 days. Failure to return this may delay the conveyancing of the case.

In cases where a formal offer has been made, creditors are asked to consider suspending/limiting any interest charges or fees for a **seven-week period** to allow

the case to complete. This is particularly beneficial where creditors have agreed a shortfall or where redemption figures are time barred.

9. Conveyancing of cases

On receipt of signed offer letters from the **debtor, purchaser and where applicable the Trustee**, the case will be transferred to the Home Owners' Support Fund scheme solicitors Anderson Strathern.

The Scottish Government will write to creditors to inform them that the case has been transferred and will supply a copy of the mandate granting the scheme solicitors authority to request information under the Data Protection Act 1998.

Thereafter the Home Owners' Support Fund team will not be able to provide case updates on any transferred case. Enquiries relating to transferred cases should be made directly to Morton Fraser.

As part of the transfer of funds, it will be required that creditors discharge any inhibitions or securities on the property.

10. Estimated case completion timescales

Estimated timelines are detailed in the table below:

Process	Permitted Timescales	Responsible body
Application logging	Two to three days	SG HOSF team
Desk top survey	Four days ⁺⁺	First Surveyors (on behalf of SG)
Personal search	Four days ⁺⁺	Anderson Strathern (on behalf of SG)
Single survey	Two weeks* ⁺⁺	First Surveyors (on behalf of SG)
Medical evidence	28 days ⁺	Homeowner
Agreement to consider properties	48 hours ⁺⁺	Registered Social Landlords
Redemption figures	Admin procedures state two weeks – but lenders not signed up to the scheme ⁺⁺	Lenders
Agreement to sell from Trustee	Admin procedures state two weeks – but trustees not signed up to the scheme ⁺⁺	Trustees/AIB
Death/divorce certificates and building consents	28 days ⁺	Homeowner
Connections to property	Seven days ⁺	Homeowner
Inhibition details	14 days ⁺	Homeowner
National House Building Certificate	28 days ⁺	Homeowner
Repairs survey	Two weeks* ⁺⁺	Registered Social Landlords
Adjusted open market valuation	48 hrs ⁺⁺	First Surveyors (on behalf of SG)
Excess repairs funded by landlord	Seven days ⁺⁺	Registered Social Landlords

Grant agreement	Seven days ⁺	Registered Social Landlords
Funding of repairs/council tax arrears/factor fee arrears from equity	14 days ⁺⁺	Homeowner
Shortfall agreements	Up to 28 days ^{**}	Homeowner/Lenders/Money Advisors
Offer letters at interim conveyancing from all parties	14 days ^{***}	Lenders/Homeowners/Trustee/RSL
Conveyancing	Five weeks ⁺⁺	Anderson Strathern (on behalf of SG)

* Subject to homeowner providing access to property

** Lenders do not need to return offer letters as they are beneficiary

+ subject to 14-day and seven-day reminders

++ subject to reminders until issue is resolved

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Annex A

HOSF - MTSE scheme: why do the Scottish Ministers require a Ranking Agreement?

MTSE Scheme Rules require a Ranking Agreement be entered into among the commercial lender, Applicant and Scottish Ministers to regulate the relationship/priority of the Standard Security already granted by the Applicant to that commercial lender (defined in the Scheme's Ranking Agreement as the Primary Lender) and the Standard Security to be granted by the Applicant to the Scottish Ministers in respect of the equity which is to be provided by Scottish Ministers.

The Ranking Agreement will provide for the commercial lender's security to take priority to the Scottish Ministers to the extent of the Priority Debt. The Priority Debt will be a defined amount (£# – which will be confirmed by the commercial lender prior to settlement) plus interest and expenses incurred in connection with it.

The position as to the priority of securities under the general/common law if no Ranking Agreement were entered into would be as follows:-

If a Standard Security were granted to Scottish Ministers and then intimated to the commercial lender with a previously registered Standard Security then on the commercial lender receiving that notice intimating the second Standard Security, the priority of the first Standard Security is then effectively restricted to (a) existing advances; (b) any further advances that the commercial lender is contractually obliged to make; (c) interest present and future on those advances; and (d) expenses which have been or may be incurred by the creditor.

Therefore the reasons that the Scheme Rules provide for a Ranking Agreement to protect the Scottish Minister's legal position are multiple:

- 1 The Ranking Agreement gives the Scottish Ministers a contractual confirmation of the extent of the Priority Debt at the given date, rather than this being fixed on intimation of the charge. Note also that the commercial lender could be contractually obliged to advance further money which would also receive priority. This has commercial risks for the Scottish Ministers at the point they advance funds as there may be insufficient equity to cover their advance. The Scottish Ministers would not have certainty as they do in terms of the Ranking Agreement as to the amount of the then outstanding Priority Debt or whether there were other advances which that commercial lender was contractually obliged to make to the Applicant.
- 2 The Ranking Agreement gives the Scottish Ministers a number of other contractual protections. It regulates the cooperation between the Primary Lender and the Scottish Ministers on any enforcement action under either of the two standard securities.
- 3 The Ranking Agreement protects the Scottish Ministers by prohibiting the Primary Lender assigning the debt to them without the Scottish Ministers' consent.
- 4 The Ranking Agreement includes a confirmation from the Applicant allowing and acknowledging that the Primary Lender and the Scottish Ministers can disclose information to each other about the Applicant and its affairs to the extent which they wish.
- 5 The Ranking Agreement protects the Scottish Ministers by obliging the Primary Lender to notify of any increase in any facilities it grants to the Applicant.
- 6 The Ranking Agreement includes a specific acknowledgement by the Applicant that they will not grant any other fixed charges without the consent of both lenders. It is likely that the first Standard Security in favour of the commercial lender will also include such a 'negative pledge' clause which – without the Ranking Agreement being signed by the commercial lender – would be breached by the grant of the subsequent Standard Security to the Scottish Ministers which could in itself immediately trigger enforcement action under the first Standard Security if we relied on the general/common law position without a Ranking Agreement.

As such, the legal protection afforded to the Scottish Ministers by the grant of a Standard Security with the grant of a Ranking Agreement is not equivalent to the general/common law position. This is why the MTSE Scheme Rules provide for a formal Ranking Agreement, as do many similar Government lending schemes.